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THE

AMERICAN STATE REPORTS,

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CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

Vol. LXXI.

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AMERICAN STATE REPORTS.

VOL. LXXI.

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CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

ANDERSON v. ANDERSON.

[124 CALIFORNIA, 48.]

MARRIAGE AND DIVORCE—DECREE FOR MAINTENANCE—RECEIVER.—If a wife sues her husband for a divorce on the ground of his extreme cruelty, praying that a portion of what she claims to be the community property be awarded to her, that a receiver be appointed, and for general relief, but the divorce is denied, she is entitled to a decree for the maintenance of herself, and the children under her care, and for the appointment of a receiver to enforce such decree, where the statute authorizes such a decree in case the divorce is denied, if the case made by her shows that her husband has left her without cause; that he has been guilty of conduct which the court finds makes it impossible for her to live with him; that she has no means; that he is a nonresident of the state; that he owns property of great value, both in the state and out of it; and that he has endeavored, and is endeavoring, to dispose of his property for the purpose of depriving her of the means of support. It is not necessary, in such a case, to charge a failure to provide the plaintiff with the necessaries of life.

MARRIAGE AND DIVORCE—NECESSITY FOR MAINTENANCE UPON REFUSAL OF DIVORCE.—Upon the refusal of a divorce asked for by a wife, the necessity of a separate maintenance for her, and the children under her care, is shown by an undenied averment in her complaint that her husband was threatening to dispose of his property in order to deprive her of the means of support.

MARRIAGE AND DIVORCE—MAINTENANCE UPON REFUSAL OF DIVORCE—SUPPORT OF MINOR CHILD.—Upon the denial of a wife's application for a divorce, the court, in granting a decree for the maintenance of the plaintiff, may properly make an allowance to her for the support of a minor child, who is in the mother's custody and is supported by her, although the custody of the child has not been awarded to the plaintiff. The husband has no reason to complain, for such a provision relieves him from liability for the support.

MARRIAGE AND DIVORCE—MAINTENANCE UPON REFUSAL OF DIVORCE—SUPPORT OF INVALID ADULT

DAUGHTER.—Upon the denial of a wife's application for a divorce, the court, in granting a decree for her maintenance, may properly make an allowance to her for the support of an invalid daughter under her care, who is past eighteen years of age, and who is dependent upon her parents for support.

MARRIAGE AND DIVORCE—MAINTENANCE UPON DENIAL OF DIVORCE—WHAT MAY BE CONSIDERED.—In fixing the amount of maintenance, upon a refusal of the wife's application for a divorce, her condition in life may always be considered.

MARRIAGE AND DIVORCE—ALLOWANCE FOR MAINTENANCE UPON DENIAL OF DIVORCE—WHEN NOT EXCESSIVE—DISCRETION.—There is no settled rule to control the discretion of the trial court in making an allowance to the wife for her maintenance upon a denial of her application for a divorce. An allowance to her, however, of one hundred and fifty dollars per month, out of an income of two hundred and thirty dollars, from property in this state, beside the privilege of a dwelling-house and furniture, is not excessive, where the husband has an income, from property in another state, of four hundred and forty dollars per month.

MARRIAGE AND DIVORCE—MAINTENANCE—FINDING AS TO PROPERTY OUT OF THE STATE.—Upon denying a wife's application for a divorce, and in making an allowance for maintenance, the court's omission to find as to the expenses of property owned by the husband in another state, as to an alleged indebtedness thereon, and as to whether its income was gross or net, is not material, where the answer admits a valuation with a gross income of two hundred and eighty-seven dollars per month, and its averments as to expenses are too vague to be the subject of a finding.

MARRIAGE AND DIVORCE—APPOINTMENT OF RECEIVER IN ACTION FOR DIVORCE.—WHEN JUSTIFIABLE.—In an action by a wife against her husband for a divorce, where it appears that he is a resident of another state, to which he is attached by large holdings of property therein, and that, by reason of his nonresidence, he cannot give personal attention to his property in this state, but leaves it to the management of agents, and it is admitted by the pleadings that he has endeavored, and is endeavoring, to sell or encumber his property so as to deprive his wife of a support, the court is justified in appointing a receiver to enforce its decree of maintenance.

MARRIAGE AND DIVORCE—MAINTENANCE—MODIFYING DECREE FOR, ON APPEAL.—If a decree for maintenance contains no provision for its modification or change, the court will, upon an appeal from the judgment, be required to modify it by providing therein that, upon application of either party, upon notice to the other, and upon the proper showing therefor, it may modify or change the judgment in such mode and to such extent as it may deem just, or may set the judgment aside.

Charles R. Gray and E. R. Annable, for the appellant.

E. B. Stanton, for the respondent.

50 PRINGLE, C. Appeals from judgment and from order denying motion for new trial and from order appointing a receiver. Action for divorce. The complaint alleges that plaintiff was married to defendant in New York, has resided for more

than eight years in California; there are six children living, the two youngest being a daughter of nineteen, and a son of eleven years; charges extreme cruelty in many forms, growing out of a morose and cruel disposition; alleges that defendant deserted plaintiff in 1893 and went to live in New York; that defendant is the owner of a block of land in the town of Riverside, containing two and one-half acres, upon which are situated nine dwelling-houses, value about eighteen thousand dollars, rent one hundred and seventy dollars per month; also the northwest one-quarter of another block with four dwelling-houses, value about seven thousand five hundred dollars, rent sixty dollars per month; also fifty-five acres of rancho San Bernardino, planted in deciduous trees, no income; also personal property, consisting of household furniture of the value of two thousand dollars, a mortgage given by R. J. Mills for fifteen hundred and twenty-five dollars, and mortgage of six hundred dollars by Archie Brook; that all of the above is community property; that defendant is the owner of real properties in the city of Brooklyn, state of New York, of the value of fifty thousand seven hundred dollars, rents four hundred and forty dollars per month; that plaintiff is in indigent circumstances and has no means or income except what may be derived from the rents of these houses in Riverside; alleges upon information and belief that "the defendant ⁵¹ has endeavored to sell, convey, transfer, and encumber portions of the premises above described, thereby to deprive her of a livelihood and support, and is now endeavoring to make such transfers or encumbrances"; prays for divorce and the custody of the minor child; that a portion of the common property be set apart to plaintiff, and that defendant be enjoined from disposing of or in any manner encumbering the property, and that a receiver be appointed to take charge of the property, receive the rents, et cetera; with prayer for general relief. The answer denies cruel treatment and morose and ungovernable temper; admits that he has not lived with her as her husband since August, 1893, but denies that his living apart from her was without provocation; alleges that "by reason of the unfortunate condition of things surrounding defendant he became addicted to the use of intoxicants and was more or less under their influence from day to day," but denies that plaintiff was in great fear of him in that condition; alleges that the property in the state of California is all his separate property, having been purchased with funds acquired by him in the state of New York as his separate property under the laws of that state; that the

mortgage given by Archie Brook for six hundred dollars has been paid up and the money properly expended for medical services and payment of debts; that defendant is indebted in the sum of ten thousand and seven dollars in the state of New York; denies the values put upon the properties in Brooklyn and the rents stated, and alleges that after paying taxes, water rates, repairs, and insurance and interest on the debt, the income is nearly exhausted and furnishes very little toward the support of either himself or family. The answer does not deny the values or rents of the California properties, or the charge made in the complaint that defendant has endeavored to sell, convey, transfer, or encumber portions of the property to deprive plaintiff of a support, and is now endeavoring to make such transfers or encumbrances; does not deny that plaintiff is without means.

The court finds that the defendant was morose and suspicious, and unjustly accused plaintiff of want of chastity; was unreasonable and abusive; that such conduct was wholly due to jealousy and a morose disposition; that defendant was not otherwise, ⁵² intentionally cruel in his conduct toward plaintiff; that this action was commenced by plaintiff under the belief that defendant was endeavoring to sell and dispose of his property, that she did not wish to obtain a divorce except for the purpose of preserving the property; that plaintiff has always conducted herself in a proper and blameless manner, and used her best efforts to conciliate the defendant, "that since the month of August, 1893, without any reason, cause, or excuse, defendant has refused to live with plaintiff. That, since said date and before said date defendant has given but very little or no attention to the care of the property mentioned and described in plaintiff's complaint. He has allowed the property to be controlled by agents, and has given it no personal attention. Defendant has not been engaged in any business. He has been reckless and extravagant in his expenditures and has squandered large sums of money, and his estate has become seriously impaired by his extravagance and reckless expenditure. He has shown no reasonable disposition to support or maintain plaintiff or his children, but has shown a disregard of the rights of plaintiff and his children to support. His conduct toward plaintiff and his children has been willful and intentional. . . . He has shown no disposition or desire to resume marital relations with plaintiff or to live with her, and the conduct of defendant toward plaintiff has been, and is, unjustifiable, and renders it

impossible at present for them to live together. His conduct shows that he is unwilling to support his wife and children, and that he has tried to avoid supporting them, and to squander, dispose of, and encumber the property upon which they are dependent for support. That the property in California is sufficient, if properly administered, to provide for the support and maintenance of plaintiff and the children, and to yield a surplus, after paying the expenses of maintenance of said property and the support of plaintiff and her children, toward the support of defendant, and in addition the defendant has the entire management and control of all the property situated in the state of New York, described in paragraph 15 of the plaintiff's complaint. That it is apparent that the defendant, if allowed the control of the property in California, will not provide for the maintenance and support ⁵³ of the plaintiff and his children, but will recklessly squander said property and ignore their rights."

The court finds that all the property in the state of California is the separate property of the defendant, and finds that two of the children, Harry and Etta, the daughter, are dependent upon plaintiff and defendant for support, and have heretofore been and now are supported by plaintiff, and are residing with her.

From the above facts the court holds that the conduct of the defendant did not amount to extreme cruelty, and that plaintiff is not entitled to a divorce; that plaintiff is entitled to a reasonable support and maintenance out of the property of defendant for herself and the two children, the daughter and son; that a receiver be appointed to take charge of and manage the property; that plaintiff be paid by the receiver one hundred and fifty dollars per month for the support of herself and children, and be allowed the use of the house at Riverside occupied by her, and the household furniture.

Judgment is entered in accordance with the conclusions of law, and charges all the real properties with a lien in favor of the plaintiff to secure the payment of the maintenance awarded to her. The judgment recites that the mortgages of Mills and Brook had been paid.

The appellant contends that under these pleadings the plaintiff is not entitled to decree for maintenance, and that the court has gone outside of the issues to make a case for maintenance. But the case comes within section 136 of the Civil Code, as settled in *Hagle v. Hagle*, 68 Cal. 588. The wife charges that the husband has left her without cause, and charges conduct on the

part of the husband which the court finds makes it impossible for her to live with him, alleges her own want of means, and prays that a portion of what she claims to be the common property be awarded to her, and prays for general relief. Under the case made in the complaint it was not necessary to charge a failure to provide the plaintiff with the necessities of life. And, if it were, the necessity of a separate maintenance is shown by the undenied averment that defendant was threatening to dispose of the property in order to deprive her of the means of support.

⁵⁴ The point is made that the custody of the minor child is not awarded to the plaintiff, and for that reason nothing should be allowed for his support, and also that the daughter is of age, and nothing should be awarded for her support. So far as the minor child is concerned, it is found that he is in the custody of the mother and is supported by her. As long as this state of facts continues the father has no reason to complain; for, by the provision thus made for the support of the son, he is relieved from liability himself. The case is different with the daughter. In her case it appears from the findings that she is residing with her mother, and that, although of age, she is dependent upon her parents for support. Section 136 provides that though judgment of divorce is denied the court may, in an action for divorce, provide for the maintenance of the wife "and her children, or any of them." It has been held under a statute of Oregon, somewhat analogous, that the word "children" must be construed to mean "minor children": *Fitch v. Cornell*, 1 Saw. 156. But the court adds: "The reason is they are no longer in the custody or under the control of their parents, nor are the latter bound to maintain them except under peculiar circumstances arising from poverty or sickness." The same intimation appears in *Snover v. Snover*, 13 N. J. Eq. 261, where the chancellor says: "From the evidence now before the court I incline to the opinion that if the daughter continues in health the allowance for her support should cease when she attains the age of eighteen. I will hear an application on this ground from the father at the proper time." And so, in the present case, under any change of circumstances, with reference either to the son or daughter, the court may at any time make a modification of the judgment, if it hold that under the circumstances of the case the presence of the children influences the amount of the allowance. In this connection section 206 of the Civil Code is important, in the line of the intimations of the

Oregon and New Jersey courts. That section provides that it is the duty of the father and mother of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability. In view of the finding that the daughter is dependent upon her parents for support, we must presume that from ill-health or other cause she is "unable to maintain ⁵⁵ herself by work." It does, in fact, appear in the testimony, without objection, that the daughter is an invalid.

From the above reasons, which are sufficient to support the judgment on this point, it becomes unnecessary to determine whether, under section 136, the court may not, in granting a maintenance, properly take into consideration the size of the family, adult or minor, which the husband has left with his wife in his home, as an element entering into "her condition in life," which may always be considered in fixing the amount of maintenance.

It is insisted that the allowance of one hundred and fifty dollars to the wife out of an income of two hundred and thirty dollars derived from the California property of the husband is excessive, the privilege of dwelling-house and furniture being also allowed to her. There is no settled rule which can be invoked in such a case to control the discretion of a trial court; and there is nothing here to show abuse of discretion. It is claimed that there is a fatal omission to find whether the income of the New York property as established by the findings is gross or net, or to find the amount of expenses to which it is subject, or the amount of indebtedness of the husband. The income is found to be about four hundred and forty dollars per month, and the value of the property about fifty thousand seven hundred dollars. The answer does not state definitely the amount of expenses to which the income is subject, but only that after paying interest and other expenses the income will "furnish very little toward either the support of himself or his family." It states an indebtedness of ten thousand and seven dollars; but admits a valuation of property in New York to the amount of forty-five thousand dollars, with gross income to the amount of two hundred and eighty-seven dollars per month. Under these circumstances, it cannot be said that the omission to find as a fact the existence of the indebtedness stated in the answer is material. The trial court evidently did not so regard it. The statements in the answer as to the expenses of the property are too vague to be the subject of a finding.

A more serious question is the necessity of the appointment of

a receiver in the case. Section 140 of the Civil Code provides that the court may require the husband to give reasonable security ⁵⁶ for making any payments required, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case. It is charged in the complaint, and not denied in the answer, that the husband has endeavored and is endeavoring to sell and transfer or encumber his property and thereby to deprive the wife of a support.

The defendant is a resident of the state of New York. Where so much is necessarily committed to the discretion of the trial court, depending in each case upon its estimate of the character of the parties, as exhibited in matters too numerous or too trivial to go into the record, we cannot say that there was an abuse of discretion in this case in the appointment of a receiver. That the defendant was a nonresident of this state, attached to his residence in New York by large holdings of property, is a strong circumstance tending to make a receivership the most natural, as well as the most effective, method of enforcing compliance with the order for maintenance. And the severity of the method devised is mitigated by the fact that he did not, as from his nonresidence he could not, give personal attention to his properties in this state, and left them to the management of agents. Under the management of a receiver, judiciously appointed, and subject to the control of the court, the properties may be well managed and the rights of both parties protected. These considerations probably tended to influence the judgment of the court below.

I advise that the judgment and the order denying motion for new trial and the order appointing a receiver, be affirmed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion, the order denying motion for new trial and the order appointing a receiver are affirmed. The superior court is, however, directed to modify its judgment by providing therein that upon the application of either of the parties to the action, upon notice to the other, and the proper showing therefor, it may modify or change the judgment in such mode and to such extent as it may deem just, or may set the judgment aside.

Van Dyke, J., Harrison, J., Garoutte, J.

Hearing in Bank denied.

MARRIAGE AND DIVORCE—DECREE FOR MAINTENANCE—RECEIVER.—In a suit for maintenance, the court may appoint a receiver at the commencement of the suit, and authorize him to take possession of the property of the husband and apply it to the satisfaction of the maintenance decreed to the wife: *Murray v. Murray*, 115 Cal. 226, 56 Am. St. Rep. 97. That a receiver may be appointed in a proceeding for a divorce, see monographic note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 495, on when and over what property a receiver will be appointed. It is not essential to a decree for future maintenance that property exist out of which to satisfy the decree: *Gaston v. Gaston*, 14 Cal. 542, 55 Am. St. Rep. 86.

MARRIAGE AND DIVORCE—SEPARATE MAINTENANCE OF WIFE—JURISDICTION OF EQUITY TO GRANT.—Courts of equity have jurisdiction to enforce the maintenance of a wife by decreeing proper relief in an action brought by her against her husband, independently of an action for divorce, when it is shown that he, without just cause, has abandoned her, or by his cruelty or other improper conduct has given her just cause for living separate and apart from him, and she is without means of support while he is able to maintain her: *Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557.

DIVORCE — PERMANENT ALIMONY — DISCRETION OF COURT.—There is no fixed rule as to the amount of permanent alimony. All circumstances of the parties are to be considered, and thereupon is to be determined what will be a fair and just amount. The amount to be allowed is a matter of discretion, and will not be disturbed except in a case of a plain abuse of discretion: See monographic note to *Methvin v. Methvin*, 60 Am. Dec. 671, 672, on alimony and its allowance. Alimony will be decreed with due consideration of the available means of the husband, and the condition of the parties: *Russell v. Russell*, 4 G. Greene, 26, 61 Am. Dec. 112. It may be based upon the value of the husband's property situated without as well as within the state: *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251.

DIVORCE — ALIMONY — MODIFICATION OF DECREE.—A change in the rate of alimony may be made, upon the application of either of the parties, where there is a material alteration in their circumstances, and a court, when authorized by statute, will allow alterations to be made in whatever provision might have been made before, touching alimony, upon such application: *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171. But compare *Bassett v. Bassett*, 99 Wis. 344, 67 Am. St. Rep. 863.

GRAHAM PAPER COMPANY v. PEMBROKE.

[124 CALIFORNIA, 117.]

ASSIGNMENT OF ACCOUNTS—NOTICE AS A PROTECTION TO THE ASSIGNEE.—If book accounts, bills receivable, and other debts, are assigned, the assignee must give notice of his assignment to the debtors who owe such demands, if he would protect himself against them as well as a subsequent assignee of such demands, for value, without notice of the rights of the prior assignee.

ASSIGNMENT OF SAME ACCOUNTS TO DIFFERENT PERSONS—PRIORITY DEPENDS UPON NOTICE.—As between successive assignments of book accounts, bills receivable, and other debts, made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee, if taken without notice of the prior assignment.

ASSIGNMENT OF SAME ACCOUNTS TO DIFFERENT PERSONS—PRIORITY—ILLUSTRATION.—The rights of a creditor, who in seeking to obtain some security for his claim, takes an assignment from his debtor of the latter's book accounts, bills receivable, and other debts, but leaves the demands under the control of the assignor, as his agent, for collection, without notice to the debtors of the assignment, are subordinate to the rights of a subsequent assignee and bona fide purchaser of the same demands, who takes them without notice of the prior assignment, and who immediately gives notice of his assignment to the debtors, and obtains possession of the books and accounts.

ASSIGNMENT OF ACCOUNTS—ASSIGNOR AS AGENT FOR COLLECTION—ACCOUNTING.—A creditor who has taken an assignment from his debtor of the latter's book accounts, bills receivable, and other debts, and who leaves the demands under the control of the assignor, as his agent, for collection, is not entitled to an accounting, as against his assignor, in the absence of evidence that the latter has made collections.

Gordon & Young, for the appellant.

John H. Dickinson, for the respondents S. J. and H. Pembroke.

Henry E. Monroe, for the respondent the Pacific Roll Paper Company.

118 HAYNES, C. The plaintiff, and the defendant the Pacific Roll Paper Company, are corporations. On December 23, 1893, the Pacific Roll Paper Company was indebted to the plaintiff in the sum of about fifteen thousand dollars, due on merchandise accounts, and on that day T. J. Corwin, the president of said Pacific Roll Paper Company, in the name of the corporation, by himself as president, executed to the plaintiff a written assignment of "all its book accounts and bills receivable, including all debts of every kind now due to said Pacific Roll Paper

Company, from any person or persons, and the said Pacific Roll Paper Company hereby agrees and covenants with the said Graham Paper Company to represent it as its agent henceforth in the collection of said bills and book accounts and debts, and reduce the same into cash as speedily as possible." This assignment was to be in satisfaction of the plaintiff's demand only to the extent that collection should be made.

No statement of the accounts, bills receivable, or other debts embraced in said assignment accompanied it, nor was any statement thereof afterward furnished the plaintiff, though demand was made for such statement about January 1, 1894, and afterward a partial pencil memorandum was shown the plaintiff, but was retained by the assignor to be completed.

On January 19, 1894, said Pacific Roll Paper Company sold its property, assets and goodwill, including the accounts and other demands so assigned to the plaintiff, to defendant S. J. Pembroke for the sum of twenty-three thousand five hundred dollars, part of which was paid in cash (six thousand eight hundred and fifty-three dollars), and the remainder in notes; and the answer alleged that no part of the purchase price consisted of ¹¹⁹ debts due or owing from or by the vendor; that the purchaser immediately gave notice to all persons whose names appeared upon the books of the vendor as owing said Pacific Roll Paper Company of the assignment and transfer of said accounts; and that said defendant had no knowledge or notice of said assignment to the plaintiff.

The relief demanded by the plaintiff is, in substance, that it be adjudged to be the owner of said accounts and demands; that a receiver be appointed; for an accounting; that plaintiff have access to the books; and that defendants be enjoined from collecting any of the accounts that were in existence and unpaid on December 23, 1893, and for other relief. At the conclusion of plaintiff's evidence in chief, the defendants moved for a nonsuit upon the grounds: 1. That it was not shown that the assignment to plaintiff was executed by the corporation, or that the directors ever authorized the president to make it; and 2. That no steps were taken by the plaintiff to perfect the assignment, or to act under it, and that no attempt was made to reduce the accounts to possession. Said motion was granted, and from the judgment entered thereon and an order denying plaintiff's motion for a new trial this appeal is taken.

The only questions made or discussed by counsel in their briefs are: 1. Whether Mr. Corwin, the president of the Pacific

Roll Paper Company, had authority to execute the assignment to plaintiff; and 2. If its execution was authorized by the corporation, was it valid as against S. J. Pembroke, the subsequent assignee, who was a purchaser of the same accounts and demands without notice of the prior assignment, and who immediately gave notice to the debtors of the assignment to her, and obtained possession of the books and accounts? If the second of these questions should be resolved against appellant, the first need not be considered.

To complete the assignment of an account as against the debtor, it is universally conceded that the debtor must have notice, as otherwise his debt will be discharged by payment to the assignor; but, whether the prior assignee must give notice to the debtor in order to protect himself against a subsequent assignee is a question upon which there is a conflict in the authorities.

120 "It is a well established rule in England that, as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of the prior assignment": 2 Am. & Eng. Ency. of Law, 2d ed., 1077. The reason of this rule is stated by Sir Thomas Plumer, M. R., in *Dearle v. Hall*, 3 Russ. 1, thus: "In *Ryall v. Rowles*, 1 Ves. Sr. 348, the judges held that in the case of a chose in action you must do everything toward having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession and under the absolute control of another person."

The English rule has been followed by the federal courts in this country: See *Judson v. Corcoran*, 17 How. 612; *Spain v. Brent*, 1 Wall. 604, 624; *Laclede Bank v. Schuler*, 120 U. S. 511. In *Methven v. Staten Island etc. Co.*, 66 Fed. Rep. 113, it was held that where two assignments of a chose in action, for valuable consideration, are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior

right, though the assignment to him is later in date than that to the other assignee, if taken without notice.

This proposition is also sustained in 2 Story's Equity Jurisprudence, section 1035 a, and in note 4 (p. 339), *Foster v. Cockrell*, 9 Bligh, 332, 375, 376, is quoted at considerable length, stating what appears to us satisfactory reasons in its support.

In 2 Pomeroy's Equity Jurisprudence, section 695, the same doctrine is stated, and at section 698 the learned author added: "Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority may lose it through his laches, as against a subsequent purchaser in good faith and for value who has been injured by the negligence." ¹²¹ The questions as to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants, since a judgment creditor only succeeds to the rights of his debtor, while a purchaser may acquire higher rights": See, also, 2 Pomeroy's Equity Jurisprudence, sec. 707. In 2 American and English Encyclopedia of Law, page 1077, notes 3 and 4, Iowa, Missouri, Vermont, and Virginia are mentioned as supporting the English rule, and New Jersey, New York, and Texas as rejecting it. To the former list may be added Connecticut: See *Bishop v. Holcomb*, 10 Conn. 444; *Foster v. Mix*, 20 Conn. 395.

Appellant cites a large number of the New York cases in support of its contention, and it must be conceded that they sustain the general proposition that the prior assignee has the better right, though he has not notified the debtor. We think, however, that the doctrine announced by the English courts, and followed by our federal courts and the state courts above mentioned, is based upon the better reason and sustained by the weight of authority. Notice to the debtor not only protects the assignee against payment to the assignor, but against payment to the subsequent assignee, since the debtor, with notice of the prior assignment, would be no more protected by a payment to a subsequent assignee than he would by paying to the assignor; and, besides, an intending purchaser of the accounts from the assignor would have it in his power to ascertain from the debtors, by inquiry, whether any prior assignment existed, and would thus be furnished with the only reasonable protection possible against fraud on the part of the assignor.

There are, however, some special features which strengthen the case of defendant Pembroke, the second assignee. The

plaintiff was a creditor of the assignor, endeavoring to obtain some security for its claim against the Pacific Roll Paper Company. It left the accounts and choses in action in the hands and under the control of the assignor, as its agent, for collection. The defendant, Pembroke, is a purchaser, who not only took an assignment of the accounts and other choses in action, but obtained actual possession of them and immediately notified the debtors, and therefore obtained a perfect legal title ¹²² without notice of the prior assignment, and with no means of obtaining information of it otherwise than from the fraudulent assignor, who by the sale and assignment represented that it had good right to make the sale and assignment. The case of *Kirk v. Roberts* (Cal. 1892), 31 Pac. Rep. 620, is not in point. There the defendant was the assignee in insolvency, and therefore stood in the shoes of the insolvent; while here the defendant is a purchaser in good faith and for value, without notice, and therefore stands in a better position than her assignor.

In the closing paragraph of appellant's brief it is said that plaintiff had a right of action for an accounting against the Pacific Roll Paper Company as to what it had collected on the assigned accounts, and against defendant Pembroke for whatever she may have collected since the assignment to her, and that it was therefore error to grant the motion upon the grounds stated.

As to defendant Pembroke, there was, as we have seen, no right to an accounting; and as to the Pacific Roll Paper Company there was no evidence that it had made any collections. The court would certainly not make an order requiring it to account in the absence of some evidence that it had made collections. Plaintiff called and examined Mr. Corwin as a witness, but did not ask for disclosures as to whether collections had been made, and, having rested its case, the court below could not assume that collections had been made, nor can we. Under these circumstances it does not appear that appellant has been prejudiced.

Numerous exceptions were taken to rulings on the admission and rejection of evidence. None of them are discussed in the briefs. Most of them relate to the authority of the president of the defendant corporation to make the assignment to the plaintiff, which assignment we have assumed, for the purposes of the case, was the act of the corporation. None of the other rulings would have changed the result had they conformed to plaintiff's views.

I advise that the judgment and order appealed from be affirmed.

Gray, C., and Britt, C., concurred.

¹²³ For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., and Henshaw, J.

Can Subsequent Assignees of Accounts and Claims in Action Obtain Precedence by First Giving Notice?

Upon this question there is a decided conflict of authority. In some of the states, the rule is that, as between different assignees of a chose in action, by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor: *Fortunato v. Patten*, 147 N. Y. 277, 283; *Williams v. Ingersoll*, 89 N. Y. 508, 523; *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Fairbanks v. Sargent*, 104 N. Y. 108, 58 Am. Rep. 490; *York v. Conde*, 61 Hun, 26; *Sibbald's Estate*, 18 Pa. St. 249; *Coon v. Reed*, 79 Pa. St. 240; *Inglis v. Inglis*, 2 Dall. 45; *Talbot v. Cook*, 7 T. B. Mon. 438; *Bradley v. Root*, 5 Paige Ch. 632; *Maybin v. Kirby*, 4 Rich. Eq. 105; *MacDonald v. Kneeland*, 5 Minn. 352; *Luse v. Parke*, 17 N. J. Eq. 415; *Leonard v. Burgess*, 16 Wis. 41; *Clarke v. Hogeman*, 13 W. Va. 718; *Tingle v. Fisher*, 20 W. Va. 497; *White v. Wiley*, 14 Ind. 496; *Gill v. Clagett*, 4 Md. Ch. 153; *Brander v. Young*, 12 Tex. 332; *Hopkins v. Banks*, 7 Cow. 650.

Thus, in *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633, it was held that the assignment of a chose in action takes precedence over a subsequent assignment thereof, though notice of the latter be first given the debtor; and that the prior assignment of a chose in action, though notice thereof has not been given the debtor, prevents its passing by a general assignment under the bankrupt or insolvent laws, or by attachment by a creditor of the assignor; but that the debtor may lawfully pay to a subsequent assignee, until he receives notice of the prior transfer. So, an equitable oral assignment of funds has been enforced as against a subsequent written assignment of the same funds: *York v. Conde*, 61 Hun, 26; and, as between two bona fide purchasers of a judgment, the purchaser first in time is prior in right: *Fore v. Manlove*, 18 Cal. 436. The formal assignment of a legacy prevails over the equity of a creditor of the assignor, to whom the assignor promised to make an assignment, but not upon any present consideration: *Inglis v. Inglis*, 2 Dall. 45. A voluntary assignment of a chose in action which does not affect creditors, made in good faith, is valid as against a subsequent assignee for value: *Putnam v. Story*, 132 Mass. 205, 212. If a contract for a street improvement provides that neither it nor any moneys payable thereunder shall be assigned without consent of the city, and that no rights can be asserted against the city, in the absence of its consent to an assignment, the prior assignee, as between two ex-

press assignments of moneys to grow due under the contract, made with the consent of the city, is entitled to priority, although he gave no notice of the assignment, either to the subsequent assignee or to the city. And an assignment of such moneys, as collateral security, without the consent of the city, is entitled to priority over a subsequent assignment with such consent: *Fortunato v. Patten*, 147 N. Y. 277.

It is held that, when a valid assignment is once made, the assignor has no further interest in the claim: *Clarke v. Hogeman*, 13 W. Va. 718; *Luse v. Parke*, 17 N. J. Eq. 415. Hence, after a valid assignment of a claim, no subsequent assignment thereof can give any right to the subsequent assignee: *Clarke v. Hogeman*, 13 W. Va. 718. A claim to a legacy is essentially an equitable, not a legal, claim, and an assignment thereof passes the whole right or entire interest of the assignor. After such assignment, no distinct, subsisting right, capable of being assigned, remains in the assignor. Hence, if a legatee has assigned a legacy, for a valuable consideration, it is no defense to an action, by him against the executors to recover the legacy, that they have paid it in good faith to a second assignee of the legatee, without notice of the previous assignment, as no interest, legal or equitable, passed by the second assignment. Neither can the executors escape liability to the first assignee of the legacy where they make payment to the subsequent assignee with full knowledge of the former's rights: *Luse v. Parke*, 17 N. J. Eq. 415. As between a prior and a subsequent assignee of the same debt, it is not necessary to the validity of the first assignment that notice thereof should be given to the debtor: *Tingle v. Fisher*, 20 W. Va. 497, 510. An assignee, not guilty of laches or neglect, is entitled to the proceeds of a suit in preference to a party who subsequently received an assignment thereof, to secure a pre-existing indebtedness; *Gill v. Claggett*, 4 Md. Ch. 153. The assignment of a mail contract, with the moneys to become payable thereunder, the assignee binding himself to perform the contract, entitles the assignee to priority of payment over a subsequent assignee, to whom the assignor has given an order for such moneys, upon the postmaster-general, as an indemnity against liability incurred by the second assignee as an indorser for the assignor: *Bradley v. Root*, 5 Paige, 632. An assignment in writing of a demand allowed in a probate court gives the assignee title, and a subsequent assignee, though he takes without notice, acquires nothing: *Thomas v. Liebke*, 13 Mo. App. 389, 394. The bona fide purchaser of a chose in action, with authority to collect, takes it subject to the claim of one to whom the owner has previously assigned a part interest in it, for a valid consideration: *Fairbanks v. Sargent*, 104 N. Y. 108, 58 Am. Rep. 490. If the assignee of a chose in action is guilty of fraud, or of such gross negligence in the assertion of his right, as enables the assignor to practice a deceit on a second purchaser, his equity will be postponed to that of the second bona fide purchaser: *Maybin v. Kirby*, 4 Rich. Eq. 105.

The principle running through the above cases is that, where the equities of persons, claiming under the original holder of a chose in action, are equal, the maxim, *Prior in tempore, potior in jure*,

applies: *Maybin v. Kirby*, 4 Rich. Eq. 105; *Coon v. Reed*, 79 Pa. St. 240. In other words, between conflicting equities the one prior in time is entitled to preference: *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633. One assignee of a chose in action from the owner must, it is said, necessarily acquire the same interest in it that any other assignee does, and that is, in the absence of other controlling equities, an interest subject to the rule that he who is prior in point of time is prior in right: *Fairbanks v. Sargent*, 104 N. Y. 108, 58 Am. Rep. 490. There is no legal title in the assignees of a chose in action and, the equities being equal, he who is first in time is first in right: *Tingle v. Fisher*, 20 W. Va. 497.

In some of the states, particularly in New York, the question between a previous assignee and a subsequent attaching creditor is considered the same in principle as that between conflicting assignees: *Williams v. Ingersoll*, 89 N. Y. 508, 523; the rule being that an assignment of a debt is perfect as against subsequent assignees, or attaching creditors, though no notice of the assignment has been given the debtor: *Note to Muir v. Schenck*, 38 Am. Dec. 636; *Smith v. Sterritt*, 24 Mo. 260; *MacDonald v. Kneeland*, 5 Minn. 352. Compare *McWilliams v. Webb*, 32 Iowa, 577.

In other states, in the federal courts, and in England a different rule prevails; it being held that the question which of the successive assignees of the same obligation is entitled to priority, depends not upon the date of the respective assignments, but upon when notice thereof was communicated to the debtor; and that, if an assignee does not perfect his title by giving notice, a subsequent bona fide purchaser for value from the assignor, of the same obligation, by giving notice of his assignment, will thereby acquire priority. In other words, as between different assignees, for value, of the same claim or demand, the one who first gives notice to the debtor will, as a general rule, have the prior or superior right: *Miller v. Bomberger*, 76 Pa. St. 78; *Murdoch v. Finney*, 21 Mo. 138; *Merchants' etc. Bank v. Hewitt*, 3 Iowa, 93, 66 Am. Dec. 49; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Ward v. Morrison*, 25 Vt. 593; *Campbell v. Day*, 16 Vt. 558; *Spain v. Hamilton*, 1 Wall. 604, 623; *Judson v. Corcoran*, 17 How. 612; *In re Gillespie*, 15 Fed. Rep. 734; *Laclede Bank v. Schuler*, 120 U. S. 511; *Methven v. Staten Island etc. Power Co.*, 66 Fed. Rep. 113; *The Elmbank*, 72 Fed. Rep. 610; *Dearle v. Hall*, 3 Russ. 1; *Stocks v. Dobson*, 4 De Gex, M. & G. 11, 16, and extended annotations thereto.

Thus, if a subsequent bona fide assignee of a chose in action, after inquiry, and without notice of any prior assignment, gives notice of his assignment to the debtor or trustee of the fund, and takes possession of the evidences of debt, he has a superior equity over a prior assignee of the same debt or fund, who leaves the evidences of the debt with the assignor, and gives no notice of the assignment to the debtor or trustee: *In re Gillespie*, 15 Fed. Rep. 735; compare the principal case. The question in the case of *In re Gillespie*, 15 Fed. Rep. 735, involved rival claims to a dividend, from the assignee of a bankrupt, upon proof of the bankrupt's notes, made prior to the assignment to either of the rival claimants. If a chose in action has

been assigned, for a valuable consideration, to two different persons, the assignee who first gives notice of his claim to the debtor has the better right, though the other assignment is prior in date to his: *Methven v. Staten Island etc. Power Co.*, 66 Fed. Rep. 113. A check or draft does not bind a fund in the hands of a bank until it has notice of the instrument, by presentation for payment, or otherwise; and until then other checks drawn afterward may be paid; or other assignments of the fund, or a part of it, may acquire precedence, if prior notice thereof is given: *Laclede Bank v. Schuler*, 120 U. S. 511. But one who takes an equitable assignment of part of a fund, or chose in action, for the sole purpose of securing a pre-existing debt, is held not to be a bona fide purchaser for value, entitled to priority over a previous assignment of the same character, by first giving notice of the assignment to the holder of the fund: *The Elmbank*, 72 Fed. Rep. 610. In a leading English case, a person had a beneficial interest in a sum of money, invested in the names of trustees. He assigned it for a valuable consideration, but the trustees were not notified. Afterward, he proposed to transfer his interest to another person, who, after making inquiries of the trustees and receiving no intimation of any prior encumbrance, completed the purchase, and gave notice thereof to the trustees. The court held that the second assignee had a better equity than the first assignee to the possession of the fund, and that the transfer to the second assignee, though posterior in date, was to be preferred to the right acquired under the first assignment. As to the priority of title acquired under the assignments, it was also held to be of no importance whether the interest of the vendor was vested or contingent, present or reversionary: *Dearle v. Hall*, 3 Russ. 1.

The cases above cited in this note show that there are two distinct rules, announced by high authorities, upon the subject under discussion. Under the rule that the date of the assignment controls, where there is a prior and a subsequent assignee of the same cause of action from the same person, it is evident that no assignment can be taken with safety. We are, therefore, induced to believe that the second rule, which allows the assignee who first gives notice to the debtor to obtain priority, is the better one, not only because of the reasons given in the principal case, but because it is in obedience to the general principle of law which requires that all transfers of property must be rendered as complete as the nature of the action will permit, in order to make them valid as against subsequent bona fide purchasers for a valuable consideration without notice: See *Methven v. Staten Island etc. Power Co.*, 66 Fed. Rep. 113. It is clearly the duty of an assignee, in order to perfect an assignment, to give notice to the debtor, and the amount of such a doctrine is, that the bare assignment of a chose in action does not pass it away without notice of the fact to the debtor. If notice of the assignment is not communicated, it enables the original creditor to commit a fraud, as he may assign a second time, and such assignee, although he may take the precaution of inquiring of the debtor, yet he cannot ascertain from him the fact of a previous assignment, as it has never been communicated to him: *Richards v. Griggs*, 16 Mo.

416, 57 Am. Dec. 240; *Maybin v. Kirby*, 4 Rich. Eq. 105; *Murdoch v. Finney*, 21 Mo. 138. The precaution of making inquiry is always taken by a diligent purchaser, and, if it is not taken, there is neglect, and no relief is extended to him who has been guilty of it: *Murdoch v. Finney*, 21 Mo. 138, 140; *Maybin v. Kirby*, 4 Rich. Eq. 105. If no notice is given by either assignee, the first assignment will be sustained: *Murdoch v. Finney*, 21 Mo. 138, 140.

As between the assignor and the assignee of a chose in action, the equitable right passes, of course, without any notice to the debtor, for the assignor is bound from the moment of the contract. But if the assignee means to go further and make his right attach upon the thing assigned, it is necessary to give immediate notice to the debtor or trustee of the assignment: *Murdoch v. Finney*, 21 Mo. 138, 139; *Methven v. Staten Island etc. Power Co.*, 66 Fed. Rep. 113; note to *Vanbuskirk v. Hartford Fire Ins. Co.*, 36 Am. Dec. 476; *Meux v. Bell*, 1 Hare, 73. Notice of an assignment of a demand or obligation, or a part thereof, given to the debtor, fixes the rights of the parties, and protects the assignee: *Schilling v. Mullen*, 55 Minn. 122, 43 Am. St. Rep. 475, and note. Until notice of an assignment of a chose in action is given to the debtor, the latter's rights and interests are in no way affected by the assignment: *Loomis v. Loomis*, 26 Vt. 198; *Stocks v. Dobson*, 4 De Gex M. & G. 11, and extended annotations thereto; note to *Foster v. Carson*, 39 Am. St. Rep. 698. If he, without notice, pays the debt to his original creditor, he will be protected in it: *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240. Notice to the debtor, in such a case, is as necessary to perfect the title of the assignee as a change of possession on the sale of personal property, and for the same reason: *Loomis v. Loomis*, 26 Vt. 198. But, when notified of the transfer, the debtor can thenceforth do no act to prejudice the title of the assignee: *Stewart v. Kirkland*, 19 Ala. 162; *Laughlin v. Fairbanks*, 8 Mo. 367; *Blake v. Buchanan*, 22 Vt. 548; *Bartlett v. Pearson*, 29 Me. 9. An assignment with notice imposes upon the debtor an obligation to pay the assignee: *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Miller v. Bomberger*, 76 Pa. St. 78; *Fay v. Jones*, 18 Barb. 340; *Small v. Browder*, 11 B. Mon. 212. A settlement between the debtor and a claimant after notice to the debtor of an assignment of the claim would not bind the assignee: *McCarthy v. Mt. Tecarte etc. Water Co.*, 110 Cal. 687. If an account against the estate of an intestate has been assigned, a payment thereof, by an administratrix, is a complete defense against a prior assignment of which she had no notice. To prevent such defense it is the duty of the first assignee to notify the defendant of the fact of the assignment to him before she pays it under the second assignment, and, if this is not done, the defendant should not suffer for the plaintiff's negligence: *Monticello Sav. Bank v. Stuart*, 73 Mo. App. 279.

It should be carefully observed, however, that, to enable a subsequent assignee of a chose in action to obtain a priority over a former assignee thereof, by giving the first notice to the debtor or legal holder, he must be an assignee in good faith and for a valuable con-

sideration. If he parted with no consideration, he is a mere volunteer, and stands in the same position as his assignor: *Bishop v. Holcomb*, 10 Conn. 444, 447; *The Elmbank*, 72 Fed. Rep. 617. If the subsequent assignee had notice of the earlier assignment, then he took subject thereto: *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Spencer v. Clarke*, L. R. 9 Ch. Div. 137; *Bishop v. Holcomb*, 10 Conn. 444. An assignment of a chose in action operates between the assignor and the assignee only, until the act of notice takes place which brings the debtor into the arrangement. Special notice, however, seems not to be necessary. It is enough if the party to be affected has such knowledge of facts and circumstances as ought to induce a reasonable belief of the fact; and the debtor is bound from the time of the notice, although he may not concur in the arrangement: *Note to Stocks v. Dobson*, 4 De Gex M. & G. 11. If notice of assignments are simultaneous, the earlier assignment has priority: *Callisher v. Forbes*, 7 Ch. App. 109; *Murdoch v. Finney*, 21 Mo. 138, 140. The filing of an assignment for record in a public office of the state, for the record of which the statutes of the state make no provision, carries with it no notice to other parties: *Burck v. Taylor*, 152 U. S. 634, 653. If a bond, bill, note, or like evidence of debt is assigned, and is transferred by actual, manual delivery to the assignee, no notice is required to be given to the debtor of the assignment, whether the legal title in the instrument passes by the assignment or not: *Gayoso Sav. Inst. v. Fellows*, 6 Cold. 467. If a prior assignee of a claim against a foreign country gives no information of the assignment until a subsequent assignee has prosecuted the claim before the proper officers, and obtained an award in his favor, the equities of the assignees are equal, and the possessor of the legal title ought to retain the fund: *Judson v. Corcoran*, 17 How. 612.

SACRAMENTO BANK *v.* PACIFIC BANK.

[124 CALIFORNIA, 147.]

CORPORATIONS, INSOLVENT—CREDITOR'S RIGHT TO DIVIDENDS IS NOT DIMINISHED BY HIS RECOVERY FROM STOCKHOLDERS.—The fact that a creditor of an insolvent corporation has maintained actions against, and coerced payments from, some of its stockholders does not impair his right to participate in dividends declared by such corporation while in liquidation, provided the amounts collected by him from both sources do not exceed the aggregate due him from the corporation.

CORPORATIONS — INSOLVENCY — DISPENSATION OF FUNDS—STOCKHOLDER'S RIGHT TO SHARE IN DIVIDENDS. The funds of an insolvent corporation are all to be dispensed solely for the benefit of its creditors, and a stockholder is not permitted to share in its dividends either by subrogation or otherwise.

CORPORATIONS—DOUBLE LIABILITY OF STOCKHOLDER—RECOVERY OF PAYMENTS MADE—SUBROGATION. A stockholder of a corporation is answerable to it for assessments in the full amount of his subscription to the capital stock of the cor-

poration for the payment of creditors of the corporation, and he is also individually answerable to each creditor for such proportion of the latter's claim as the amount of stock held by such stockholder bears to the whole of the capital stock. These two liabilities and the remedies based thereon are concurrent. Hence, no part of whatever he has paid, either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, can be recovered back by him, either by subrogation or otherwise.

Sawyer & Burnett, for the appellant.

Freeman & Bates, for the respondent.

Roger Johnson, for the intervenor.

¹⁴⁷ GRAY, C. Appeal from judgment for plaintiff for the sum of \$1,014.38 claimed to be due on the sixth dividend declared in favor of creditors by directors of defendant.

The appeal is taken on the judgment-roll, from which it appears that, when the defendant became insolvent and was placed in liquidation by proceedings of the bank commissioners in 1893, it was indebted to plaintiff in the sum of \$20,272.70, or thereabouts. The plaintiff presented its claim for that amount to the defendant, and that defendant in due form allowed the ¹⁴⁸ same. That from the defendant plaintiff has collected of this indebtedness, before the commencement of this suit, five dividends of five per cent each, or a total of twenty-five per cent of its original claim, amounting in the aggregate to about \$5,071.90; also from the solvent stockholders plaintiff recovered about \$5,100, being the proportion of the remaining seventy-five per cent of plaintiff's claim due from them, leaving a little over \$10,000 unpaid on plaintiff's original claim. After all these collections a sixth dividend to the creditors of five per cent was declared by the directors of the insolvent defendant, and the first question presented to the court in this case is, How should plaintiff's right in that dividend be computed, and how much is plaintiff entitled to recover on account of such dividend? The trial court decided that plaintiff's share in the sixth dividend was the same as it had been in each of the first five dividends, and that it was entitled to five per cent of its original claim as it was before anything was collected. There is no explicit statute or previous decision of this court to guide us in this matter, but I think the trial court reached a conclusion that is correct upon principle and is borne out by decisions of courts in other states on questions bearing a close analogy to those involved in this case. "If both the maker and indorser

of a promissory note are declared bankrupts, the holder may prove the note for the full amount thereof against the estate of each, and the amount for which he may prove it against the estate of each cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates will not in any event be permitted to exceed in the aggregate the amount of the note": In re Meyer, 78 Wis. 615, 23 Am. St. Rep. 435; Matter of Bates, 118 Ill. 524, 59 Am. Rep. 383. In National Bank v. Porter, 122 Mass. 308, where the question was what the dividend against the indorser should be where the payee had already received fifty per cent of his note from the maker, the court says: "The plaintiff had received fifty per cent of his debt from the estate of the maker, but this was no reason why the defendants should not pay them the fifty per cent upon the whole debt as they had entered it upon their schedule. The plaintiff was entitled to the benefit of its double security. Where both maker and indorser are liable, the holder of a note may prove the ¹⁴⁹ amount against each, and receive dividends to the full amount of his debt." On the principle followed in these cases, it appears that the plaintiff in this case is in the position of a creditor having two debtors, one being the corporation, all the stockholders representing the other, each of whom owe him his entire claim, and that he is at liberty to proceed against both, or either separately without reference to the other, until his entire claim shall be satisfied, and that the plaintiff's right to share in the dividends with the other creditors of the insolvent bank is to be measured by the amount of its claim as it was fixed by the approval of the same, made in course of the liquidation of the Pacific Bank; and it would follow from this that the plaintiff's share in the sixth dividend would be the same in amount as its share has been in every preceding dividend. By prosecuting its rights against the stockholders the plaintiff forfeited no right that it had against the Pacific Bank. The law is swift to bestow a premium upon promptness and vigilance in the pursuit of one's rights, and will not rob plaintiff of any advantage it may have gained over the other creditors by its early suit against the stockholders. If, however, the appellants were to prevail in their contention that plaintiff's right to share in dividends should be measured by the amount of its claim left after deducting all that it had received on it, the plaintiff might soon find itself in a worse position than it would have occupied had it refrained from suing the stockholders until the assets of the bank

were exhausted. A construction of the law that would lead to such a result should be avoided.

The intervenor also appeals from the judgment, contending that he, being a stockholder owning 1,738 out of the total 10,000 shares of the Pacific Bank, had been compelled by plaintiff to pay it 1,738-10,000 of its demand against the bank, and that he is, therefore, entitled to be subrogated to the extent of the last-named fraction in and to plaintiff's right in the sixth dividend. It is clearly the law that the funds of an insolvent corporation are all to be dispensed solely for the benefit of its creditors, and, while the stockholder may be compelled to put a great deal into the funds of such a corporation in the way of assessments, he is not, as a stockholder, permitted to share in its dividends either by subrogation or otherwise: Civ. Code, sec. 309.

¹⁵⁰ Under the constitution and statutes of this state, each stockholder may be compelled to pay to the corporation assessments to the full amount of his subscription to the capital stock of the corporation for the payment of creditors of such corporation, and also be individually liable to each creditor for such proportion of his claim as the amount of stock held by such stockholder bears to the whole of the capital stock. These two liabilities and the remedies based thereon are concurrent: Civ. Code, sec. 322; Const., art. 12, sec. 3; *Hiller v. Collins*, 63 Cal. 235; *Harmon v. Page*, 62 Cal. 448. It follows, then, that whatever the intervenor has paid, either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, he was bound to pay under the law, and can recover no portion of the same back, either by subrogation or otherwise.

The conclusion of law found by the court against the intervenor is, therefore, correct.

For the foregoing reasons I advise that the judgment be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Garoutte, J., Harrison, J.

THE LIABILITY OF STOCKHOLDERS IN CORPORATIONS is discussed at length in the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 838, 839, on the liability of stockholders to creditors of corporations for corporate debts. Under a provision of a state constitution declaring that each stockholder in a corporation shall be liable to the amount of the stock held by him, each is liable

for corporate debts, in addition to the risk of losing the amount of his stock, though he has paid therefor in full: *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626.

BANKRUPTCY OF MAKER AND INDORSER—DIVIDENDS AGAINST ESTATES OF BOTH.—If both the maker and indorser of a promissory note are declared bankrupts, the holder may prove the note for the full amount thereof against the estate of each, and the amount for which he may prove it against the estate of each cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates will not, in any event, be permitted to exceed, in the aggregate, the amount of the note: *In re Meyer*, 78 Wis. 615, 23 Am. St. Rep. 435, and note.

CORPORATIONS — DIVIDENDS — STOCKHOLDERS AND CREDITORS.—The claims of stockholders to dividends are subordinate to the claims of creditors: See monographic note to *Goodwin v. Hardy*, 99 Am. Dec. 761, discussing corporate dividends.

The Rights of a Stockholder Who has Paid More than His Share of the Corporate Liabilities.

Though for many years statutes have been in force in several of the states subjecting stockholders in a corporation to liability to its creditors for the amounts due them, and many actions have been maintained enforcing such liability, the principal case is the first falling within our observation, considering either the effect of payments so coerced, upon the liability of the corporation, or the rights, if any, resulting in favor of the stockholders making such payments. In this case, when the insolvent corporation had paid a dividend of twenty-five per cent to its creditors, one of them recovered judgment against a stockholder on the theory that seventy-five per cent of the corporate liability remained unpaid, and he was chargeable with his pro rata share thereof. This judgment was satisfied. Subsequently the corporation succeeded in converting other assets into money, and was able to declare therefrom a further dividend of five per cent. Thereupon the following claims were made respecting this condition of affairs: 1. The creditor insisted he had the right to share in the five per cent dividend without taking into account any payments received by him from stockholders; 2. A stockholder claimed that in paying his pro rata, based on the assumption that the corporation would discharge but twenty-five per cent of its indebtedness, he had contributed more than his just share of such indebtedness, and ought to be allowed some return out of the subsequently declared dividends; and 3. The insolvent corporation urged that the sums collected by the creditors from stockholders should be deducted from the aggregate indebtedness due him, and his dividend computed on the balance thus ascertained, but that the stockholder making such payments had not thereby created any liability in his favor against the corporation, nor any right to share in any part of the dividends declared by it.

No decisions exactly in point were cited by any of the counsel, and the court in its decision adopted, as applicable to the controversy before it, the general rule that a creditor, having a cause of action on the same obligation against two or more persons, may pursue either for the full amount until his debt is satisfied, and, on the in-

solvency of either, is entitled to have dividends declared out of his estate on the full amount of the indebtedness, notwithstanding any liability against, or any payments made by the other debtor, provided that the sums collected from both sources do not exceed the whole indebtedness.

If the action against the stockholder could have been delayed until all the assets of the corporation were converted into money and applied to the satisfaction of its liabilities, it is evident that the judgment against him must have been much less, and that, if there are other stockholders who are subjected to judgment at a later day, the basis upon which their contributions to the debts of the corporation is computed must differ substantially from the basis adopted in his case. This is a result not contemplated by the law, for it intends that each stockholder shall be liable in proportion to the stock held by him in the corporation. To illustrate, if a corporation has a liability of one hundred thousand dollars, assets worth fifty thousand dollars, and its stock is held by two persons, in equal amounts, the law, we think, intends that each shall contribute equally to make up the deficiency of fifty thousand dollars. By the statutes in California, and, perhaps, in other states, one of these stockholders might be sued at any time by all the creditors, and judgment obtained against him for his one-half of the total liabilities, or, in other words, for fifty thousand dollars. By the rule maintained in the principal case, if the assets of the corporation were after the collection of this judgment converted into money, they would pay the creditors the remaining one-half of their liability; and unless the stockholder out of whom payment was coerced has some remedy against the other, the former has contributed much more than his equitable share of the corporate liabilities. Whether, however, any such right of contribution exists, is, we believe, undetermined. If, instead of converting all its assets into money, the corporation, after the judgment against the stockholder, pays a dividend of twenty-five thousand dollars, leaving a corporate liability of seventy-five thousand dollars, and the second stockholder is then sued, the recovery against him can be for one-half of the remaining corporate indebtedness only, or, in other words, for thirty-seven thousand five hundred dollars. Hence, it must happen that though each of the stockholders owns the same amount of stock, the one first sued must contribute one-third more than the other toward the satisfaction of the corporate debts. A recovery against the second stockholder on the same basis as the first, namely, without taking the dividend into account, cannot be permitted, because thereby the creditors would obtain full payment of their debts from the two stockholders, in addition to the twenty-five thousand dollars received in dividends. The only equitable mode of adjustment, therefore, must be by payments to the stockholder out of dividends declared after the recovery of the judgment against him.

That a stockholder compelled as such to discharge some part of the indebtedness of the corporation becomes thereby, and to that extent, its creditor, we do not doubt, and, in case of its solvency, the

enforcement of his demand against the corporation must result, indirectly, in his securing contribution from his costockholders. Where it is insolvent and in liquidation, he cannot be allowed to proceed against the corporation, because he cannot be permitted to reimburse himself out of the assets set aside for creditors, for payments made to satisfy his liability as a stockholder.

O'KANE v. WHELAN.

[124 CALIFORNIA, 200.]

GIFTS CAUSA MORTIS—RECOVERY OF DONOR—FAILURE OF GIFT.—If a husband is sick, and makes a deed of gift of personal property used in his business to his wife, to secure it to her in the event of his death, the gift is ineffective where the husband recovers and uses the property in his business, in the same manner, and at the same place as before his sickness.

HUSBAND AND WIFE—FRAUDULENT SALE BY HIM TO HER—AGENCY—NOTICE.—Under a statute requiring an immediate delivery and continued change of possession of personal property to make a transfer thereof valid as against the vendor's creditors, while he remains in possession, a sale of personal property by a husband to his wife is void as against his creditors, if not followed by an immediate delivery, and actual and continued change of possession, and the wife cannot avoid the legal effect of the statute by allowing her husband to remain in possession of the property as her agent, in the absence of any notice to the world of the change of conditions.

HUSBAND AND WIFE—FRAUDULENT SALE BY HIM TO HER—SUBSEQUENT FILING OF INVENTORY BY WIFE—EFFECT OF.—If a husband makes a sale of personal property to his wife, fraudulent as against his creditors, because there is no immediate delivery, and no actual and continued change of possession, the transfer is not made valid as to his existing creditors by the fact that the wife subsequently makes, and causes to be recorded, an inventory of her separate property, as authorized by statute, and which includes the personalty which was the subject of the sale.

STATUTES—CONSTRUCTION—INVENTORY OF WIFE'S SEPARATE ESTATE—FRAUDULENT CONVEYANCES.—Whatever may be the scope and purpose of a statute, authorizing a wife to file, and have recorded, an inventory of her separate estate, it is not entitled to such a construction as would nullify the provisions of another act concerning fraudulent transfers of personal property.

John H. Durst and Robert A. Friedrich, for the appellant.

J. J. Coffey, for the respondent.

201 VAN DYKE, J. This is an action in replevin against the defendant, as sheriff of the city and county of San Francisco, to recover two horses, one express wagon, and two sets of harness, or their value, found by the court to be five hundred dollars. The goods were seized by the sheriff under an

execution issued upon a judgment recovered by F. W. Spencer Company against Frank O'Kane, April 18, 1893. The appeal is from the judgment in favor of the plaintiff, and from the order denying the motion for a new trial.

The plaintiff claims the property as her separate property under a deed of gift, as to the wagon, executed to her by her husband in 1880, and as to all of the property in question, under a bill of sale from her husband to her, in consideration of one dollar, executed September 7, 1892. The deed of gift of 1880 cuts no figure, for the reason that the plaintiff herself testifies that the object of the deed was to secure the property to her in the event of her husband's death, and that he afterward recovered and carried on his business as before his sickness, in the same manner and at the same place, and used and kept the wagon in the same manner and at the same place.

The finding of the court, that the plaintiff has been for more than four years prior to the filing of the complaint in this action in the possession of the property mentioned in the complaint, is entirely unsupported by the evidence. The testimony of the plaintiff is: "On September 7, 1892, my husband executed and delivered to me a bill of sale of six horses and three wagons and certain harness. The wagon, ²⁰² horses, and harness seized by the sheriff were included in this bill of sale. . . . The only consideration passing was the one dollar which I paid to my husband. My husband had no other property than that conveyed to me. After the execution of the bill of sale my husband continued the express business in the same way as before, and carrying on the business at the same place and stand. The horses, wagon, and harness were stabled and kept at the barn on the premises at 1036 Golden Gate avenue, and cared for the same way after the sale as before. Over the stable door after the sale, and at all times before and since, there was the sign, 'Washington Furniture Express,' 'Frank O'Kane & Son.' On the wagons are the names, 'Washington Furniture Express,' 'Frank O'Kane,' and 'Frank O'Kane & Son.' These names have at all times been on the wagons and unchanged." Frank O'Kane testified as follows: "After the bill of sale to my wife, I carried on the business the same as before, but for her. The only difference was that while before I kept all the money, afterward I gave all to her except the spending money which she allowed me. The team, wagon, and harness were at all times kept in the same place, that is, at our residence, 1036 Golden Gate avenue. The business stand was at the same place. There

remained the same signs and names over the stable door and on the wagons; and the same business card was used." This is all the testimony on the question of sale and delivery.

September 8, 1892, the plaintiff filed for record in the office of said city and county an inventory of her separate property, including therein the horses, wagon, and harness now sued for.

"Every transfer of personal property, other than a thing in action, . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession": Civ. Code, sec. 3440. To meet this provision of the law against fraudulent conveyances, the respondent relies upon sections 165 and 166, providing for the filing of an inventory of the separate personal property of the wife. This question was directly passed upon ²⁰³ in *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200. In that case the wife claimed that she had purchased the horses in question from her husband, Wyman Murphy, on January 11, 1890, which were seized by the defendant, as sheriff of Sonoma county, November 16, 1891, under a writ of attachment in favor of the Santa Rosa Bank and against her husband, the said Wyman Murphy. The court there say: "From the evidence of the plaintiff it will be perceived that no actual change of possession of this property took place at the time of the delivery of the bill of sale; but, on the contrary, in all its surroundings, it remained entirely in statu quo. Mrs. Murphy attempts to escape the legal effect of the foregoing evidence by the claim that she had appointed her husband her agent to take the possession and control of the horses for her, and, as such agent, his possession was her possession; but there is nothing to be urged in favor of such a contention. Both the letter and spirit of the law contained in section 3440 would be defeated by the recognition of such a principle. The object of the statute is to require notice to the world of the transfer of personal property, in order that men may be able to deal with each other upon equal terms and from a common level. The efficacy of the statute would be entirely destroyed if the vendor were allowed to remain in possession of the property as the agent of the vendee, in the absence of any notice to the world of such a change of conditions. A practice of that kind would be in direct conflict with the terms of the statute itself." Further:

"The transfer of the property in litigation by bill of sale was made January 11, 1890, and upon December 30th following plaintiff filed an inventory of her separate property in the recorder's office, in accordance with the provisions of section 165 of the Civil Code. The Santa Rosa Bank became a creditor prior to the recording of the inventory, and the attachment proceedings upon the husband's indebtedness were begun November 16, 1891. It is now insisted by respondent that conceding no immediate delivery and actual and continued change of possession took place at the date of the bill of sale, still the subsequent recording of the inventory in the recorder's office of her separate property, including these horses, cured any defective compliance with the provisions of section 3440, and gave her good title against the world from ²⁰⁴ that day. It is unnecessary to pass upon the scope and purpose of section 165 of the code. Whatever may be its scope and purpose, we are well satisfied it is not entitled to a construction that would nullify the provisions of section 3440 as to fraudulent transfers of personal property."

On the authority of that case, as well as from the fact that the finding of the court referred to is unsupported by the evidence, the judgment and order refusing a new trial are reversed.

Garoutte, J., and Harrison, J., concurred.

Hearing in Bank denied.

GIFTS CAUSA MORTIS—DELIVERY—FAILURE OF GIFT—RECOVERY OF DONOR.—There must be a delivery to perfect a gift causa mortis, but it may be either actual or constructive: *Notes to Keepers v. Eldellty Title etc. Co.*, 44 Am. St. Rep. 402; *Thomas v. Lewis*, 37 Am. St. Rep. 878. The delivery must be complete and the gift must also be retained by the donee until after the donor's death: *Note to Drew v. Hagerty*, 10 Am. St. Rep. 257. If, after delivery, the donor again has possession, the gift is nugatory: *Dunbar v. Dunbar*, 80 Me. 152, 6 Am. St. Rep. 166. Such a gift must be made during a last illness, and is revoked by the donor's subsequent recovery: *Weston v. Hight*, 17 Me. 287, 35 Am. Dec. 250. In other words, it reverts to the donor, if he survives: *Priester v. Priester*, Rich. Eq. Cas. 26, 23 Am. Dec. 191.

SALE OF PERSONALTY—EFFECT OF GRANTOR REMAINING IN POSSESSION.—Retention of possession by the seller, upon a sale of chattels, is not merely evidence of fraud, but in itself makes the transaction fraudulent as to subsequent bona fide creditors and purchasers from him: *Stephens v. Gifford*, 137 Pa. St. 219, 21 Am. St. Rep. 868.

MOYNIHAN v. DROBAZ.

[124 CALIFORNIA, 212.]

SHIPPING—REGISTRATION OF VESSEL AS EVIDENCE OF ITS OWNERSHIP.—An entry in the custom-house books of the registry or transfer of a vessel is not admissible in evidence for the purpose of showing ownership in the craft. It is not even prima facie evidence of ownership as against one not claiming to be an owner, unless the entry is shown to have been made by authority of the person named in it.

SHIPPING—DECREE AND PAPERS IN ADMIRALTY AS EVIDENCE OF OWNERSHIP OF VESSEL.—A decree and copies of papers in a libel suit against a vessel, brought in the United States district court, are not admissible in evidence, in an action brought to enforce a demand against the vessel, for the purpose of proving that a person who did not appear or assert any interest in the admiralty proceeding, owns a part of the vessel.

ADMIRALTY—CONCLUSIVENESS OF DECREE—OWNERSHIP.—When a vessel has been seized in admiralty, the court has jurisdiction to pass upon the question of its ownership, after affording parties an opportunity to appear and be heard, and its decree is conclusive upon them. Every person interested in the vessel is warned to come in and assert his interest, but no one can be decreed to be a part owner who has not appeared and asserted part ownership, or other interest therein.

CORPORATIONS—CORPORATE EXISTENCE—PLEADING—DENIAL—ADMISSION.—An allegation of corporate existence, if not denied, is deemed to be admitted.

APPEAL—CONSIDERATION OF FINDING OUTSIDE OF ISSUE.—A finding which is against the admission of the pleadings, and outside of any issue presented in the case, must be disregarded.

SHIPPING—ATTACHMENT OF VESSEL DOES NOT DISPLACE PRE-EXISTING LIEN.—A stipulation that, at the time of the commencement of an action to enforce a lien upon a steamer, for a balance due on a contract of construction, the vessel had been seized upon attachment and released upon a bond, does not justify a conclusion of law that the plaintiff did not have, at the time, a lien upon the steamer.

Stanly, McKinstry, and Bradley & McKinstry, for the appellants.

Andros & Frank, for the respondents.

213 VAN DYKE, J. This action is to recover a balance due from defendant Matteo Drobaz on a contract to construct a boiler for the fishing steamer "Golden Gate," and to enforce a lien on said steamer to satisfy said demand, under the provisions of the Code of Civil Procedure in reference to actions against steamers, vessels, and boats.

On the trial the court admitted as evidence, over the objection of the plaintiffs, a copy of the register of the vessel "Golden Gate," for the purpose of showing that the plaintiffs were part

owners in the said vessel. The entry in the custom-house books of the registry or transfer of a vessel is not even *prima facie* evidence as against one not claiming to be an owner, unless such entry be shown to have been made by authority of the person named in it. In *Fraser v. Hopkins*, 2 Taunt. 5, Lord Mansfield said, in reference to the contention that the entry was evidence against such person: "To suppose the effect of the act to be such as is contended for would be to impute madness to the legislature." And Hunter, J., said: "Any bystander may put down a name in the register. You must connect the defendant with it." And Lawrence, J., adds: "Unless you show all this taken down by authority of the person who is to be charged, the register cannot be made evidence even *prima facie*": See, also, *Tinkler v. Walpole*, 14 East, 226; *Hozey v. Buchanan*, 16 Pet. 215; *Calais etc. Co. v. Van Pelt*, 2 Black, 388. And for like purpose the court also admitted as evidence, over the objection of the plaintiffs, a decree and copies of certain papers in the case of *Chandler*, as libellant, against the same steamer "Golden Gate," in the United States district court. In admiralty, where the proceeding is in rem, the libel prays for process—that is, a warrant of arrest of the thing itself—and a monition to all persons interested to appear upon a certain day and intervene for their interests. The jurisdiction acquired by the seizure of property in such proceeding is to pass upon the question of ownership of such property after opportunity has been afforded to parties to appear and be heard, and the decree in such cases is conclusive upon all such parties. Every person interested in ²¹⁴ the vessel is warned to come in and assert his interest; necessarily no one can be decreed to be a part owner who has not appeared and asserted part ownership, or other interest. It was clearly error to admit a copy of said register and copies of said papers in admiralty for the purpose indicated: *Benedict on Admiralty*, 410-34; *Windsor v. McVeigh*, 93 U. S. 274. But respondent's counsel say if the court erred either in admitting the ship's register, or in admitting the judgment in the United States district court, or in both respects, it is not such error as entitles the plaintiff to a new trial, for the reason, it is claimed, that there is still sufficient independent proof of ownership to warrant the finding in favor of the defendants.

The only outside evidence bearing upon the question of the ownership of the plaintiffs in the vessel is the following: Defendant *Drobaz* says: "The vessel was built in Sausalito, and

was to be a steamer for fishing purposes. He started to build her by my orders, Moynihan, Pearson, and several others."

Moynihan testifies that he paid in five hundred dollars to Drobaz for one share of stock, and took his receipt, which reads:

"(\$500.)

San Francisco, October 1, 1890.

"Received of T. J. Moynihan five hundred dollars for one share of M. Drobaz Steam and Sail Fishing Company.

His

"MATTEO X DROBAZ."

mark.

The complaint alleges that the plaintiffs were, at all the times therein mentioned, copartners carrying on business under the firm name and style of Moynihan & Aitken, and it is also alleged in the complaint "that the defendant, the Matteo Drobaz Fishing Company, is, and for more than three months prior to the commencement of this action was, a corporation duly organized and existing under and by virtue of the laws of the state of California."

The answer nowhere denies the allegation of partnership of the plaintiffs, or that they carried on business as such, and nowhere denies the allegation that the Matteo Drobaz Fishing Company is a corporation. Besides, the defendant, Matteo Drobaz Fishing Company, as such, files a separate answer in which it does not deny its alleged corporate existence, but does deny that the Matteo Drobaz Fishing Company was the owner of said ²¹⁵ steamer "Golden Gate." By Drobaz's receipt and Moynihan's testimony the latter had one share in said company.

The court finds, however, that the Matteo Drobaz Fishing Company was not at any time a corporation and did not own the steamer; hence Moynihan was not a part owner. Yet the court finds that the said steamer was owned by Matteo Drobaz and a number of other persons, including the plaintiffs herein, James Aitken and T. J. Moynihan, as part owners.

By the failure of the defendants to deny the allegation of the corporate existence of the Matteo Drobaz Fishing Company that fact is deemed to be admitted (Code Civ. Proc., sec. 462), and the finding against such corporate existence is not only a finding against such admission, but also without any issue presented upon which to make a finding: Code Civ. Proc., sec. 590. There is not a particle of testimony that the plaintiff, James Aitken, ever had any interest in the vessel or in the said company, or that the partnership firm of Moynihan and Aitken, or said

James Aitken, were part owners in said vessel, or had any interest therein.

The court also finds that at the time of the issuance of the writ of attachment (under section 813, et seq., of the Code of Civil Procedure) a written undertaking was received by the clerk which was not to the effect that if a judgment was rendered in favor of the owner of the steamer, the plaintiffs will pay all costs and damages that may be awarded against them, or all damages that may be sustained by the owners, not exceeding the sum specified in the undertaking. There is no issue presented in the case on which this finding is required. Besides, it is stipulated that at the commencement of the action the vessel was seized under the provisions of the code referred to, and was released upon a bond being given on the part of the defendants as therein required. From this the court erroneously finds as a conclusion of law that the plaintiffs, at the time of the commencement of the action, had no lien upon the said steamer "Golden Gate," and are not entitled to recover anything in the action, but that the defendants are entitled to their costs.

The order denying a new trial is reversed and a new trial ordered.

Garoutte, J., and Harrison, J., concurred.

SHIPPING—VESSELS—REGISTRATION AS EVIDENCE OF OWNERSHIP.—The certificate of registry of a vessel is not competent evidence to prove or disprove its ownership by any particular person: *Lincoln v. Wright*, 23 Pa. St. 76, 62 Am. Dec. 316. The registry of a vessel is not evidence of title, even as against the person named in it as owner, without extraneous proof that it was made with his authority or assent, and even then it is not conclusive: *Bradbury v. Johnson*, 41 Me. 582, 66 Am. Dec. 264.

ADMIRALTY—DECREE—CONCLUSIVENESS.—A decree of a court of admiralty, having jurisdiction in rem, is conclusive everywhere, and on all persons who have an interest in the thing: *Thoms v. Southard*, 2 Dana, 475, 26 Am. Dec. 467.

PLEADING—ADMISSION OF FACT OF INCORPORATION.—If the incorporation of the defendant, averred in the declaration, is not denied by the plea, that fact must be taken as admitted: *Norfolk etc. R. R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

APPEAL.—A FINDING outside of the issues must be disregarded: *Albertoli v. Branham*, 80 Cal. 631, 13 Am. St. Rep. 200.

SVETINICH v. SHEEAN.

[124 CALIFORNIA, 216.]

HUSBAND AND WIFE—SEPARATE PROPERTY OF HUSBAND—JOINT DEED.—If a husband purchases property with his separate means, he may show that it is his separate property, and was so understood at the time of the conveyance, although the deed was taken in the name of himself and his wife. He may show that she has no estate or interest therein; that it was not intended as a gift to her, either in whole or in part; and that he permitted the conveyance to be made to them jointly, in order that the property might be better managed and cared for during his absence from home as an officer of the United States navy.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION.—Property conveyed, for a money consideration, to either or both of the spouses, before the amendment of section 164 of the Civil Code of California, in March, 1889, was, there being no proof to the contrary, deemed to be community property.

EXECUTION—JUDGMENT AGAINST WIFE—WHAT MAY NOT BE SOLD.—Neither the separate property of a husband nor community property can be sold upon an execution on a judgment, obtained individually against his wife.

Marcus Rosenthal, for the appellant.

John H. Durst, for the respondent, Timothy Sheean.

James A. Stevens, for the respondent, Eliza Sheean.

216 VAN DYKE, J. This is an action to quiet title to a certain lot in the city of Vallejo, Solano county. The title claimed by the plaintiff is founded upon a sheriff's deed. The plaintiff, September 30, 1895, obtained a judgment against the defendant Eliza Sheean, in the city and county of San Francisco, and upon this judgment levied upon the right, title, and interest of said defendant Eliza Sheean in and to said lot, and under said judgment and levy, March 2, 1896, a sale was made by the sheriff of Solano county of said interest to the plaintiff in said action, **217** who is the plaintiff here. No redemption having been made, the deed in question was executed October 17, 1896. Defendants, answering, denied any title in the plaintiff, and alleged that the title and ownership of said property are in the defendant Timothy Sheean; and said Timothy Sheean, in a separate answer and by way of cross-complaint, sets forth that said lot was purchased by his separate means, and, although the deed was taken in the name of himself and his wife, it was his separate property and so understood at the time. The court finds that the said Timothy Sheean permitted said deed of conveyance to be made to said Timothy Sheean and Eliza Sheean

jointly, solely in order to enable the better management and care thereof, and not as a gift in whole or in part to said Eliza Sheean; that the said Timothy Sheean was absent from home a great deal of the time in the service of the United States as an officer in the navy; that the said Timothy Sheean is the owner of said property in fee simple to his own separate use and benefit, and that the defendant Eliza Sheean has no interest or estate therein; that the plaintiff had notice and knowledge of the rights and estate of defendant Timothy Sheean in said property, and notice and knowledge that any title, estate, or interest therein or thereto held by said Eliza Sheean was held in trust for defendant Timothy Sheean. The evidence abundantly supports the findings.

The first error assigned by the appellant is the refusal by the court to allow the plaintiff to testify as to a conversation had with Mrs. Sheean, in the absence of her husband, as to the ownership of the property. What Mrs. Sheean may have said in the absence of her husband could not bind him, nor affect his title to the property. Besides, the plaintiff, on being recalled, was allowed, without objection, to state as follows: "I am the purchaser of said property under the execution sale. . . . Down to the time of the sheriff's sale I did not know that the defendant Timothy Sheean claimed that the undivided one-half thereof standing in his wife's name was held by her in trust for him, or that he claimed said one-half to be his own property. I had no notice of that from any source. Nobody told me anything of the kind. The only information I had about it was from Mrs. Sheean, who told me that she owned the property—²¹⁸ that it belonged to her." He was, however, notified at the time of the sale, as he inferentially admits, that the defendant Timothy Sheean claimed the property, and therefore he did purchase with notice: *Bank of Mendocino v. Baker*, 82 Cal. 114.

The record shows: "It was here admitted by plaintiff that it was a fact that at all times since said conveyance by Catherine Reynolds (the grantor of the defendants) the property had been assessed for state and county and town taxes to the defendant Timothy Sheean; that the tax receipts for said property ran to Mr. Sheean right along, but plaintiff objected to the admission of evidence of that fact on the ground that the same was irrelevant, incompetent, and immaterial." The appellant makes the point that the court erred in admitting this evidence. It was admitted for the purpose of meeting an issue made by an affirmative allegation in the cross-complaint, to wit: "This de-

defendant further alleges that he is now and for more than five years last past has been the owner of said parcel of land, and has been in the open, notorious, and exclusive possession thereof, and adverse to all persons whatsoever, and has paid for more than five years last past all taxes of every kind and description levied thereon." The finding of the court supports this allegation.

The conveyance from Catherine Reynolds running to Timothy Sheean and his wife was dated February, 1886, and was at once put on record in Solano county. At that time, and up to the amendment of section 164 of the Civil Code, in March, 1889, it had been repeatedly held by this court that property conveyed for a money consideration to either or both of the spouses was deemed community property: *Ramsdell v. Fuller*, 28 Cal. 43, 87 Am. Dec. 103; *Jordan v. Fay*, 98 Cal. 264; *Gwynn v. Diersen*, 101 Cal. 563.

Appellant makes the point that the notice at the sheriff's sale stated that the property was claimed as community property on the part of defendant Timothy Sheean, and also as a homestead, whereas there was no valid homestead. But, if it had been community, instead of separate, property of Timothy Sheean, as found by the court, still it would not be subject to execution and sale on a judgment obtained against Eliza Sheean individually.

²¹⁹ The judgment and order denying a new trial are affirmed.

Harrison, J., and Garoutte, J., concurred.

HUSBAND AND WIFE—SEPARATE PROPERTY—PRESUMPTION AS TO COMMUNITY.—When it is established clearly and conclusively that the property was purchased with the separate money of one of the parties, it remains the separate property of the party with whose money it was purchased: *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; but property purchased during marriage is presumed to belong to the community, whether the conveyance is made to the husband, or wife, or to them jointly: *Huston v. Curl*, 8 Tex. 239, 58 Am. Dec. 110; note to *Biggi v. Biggi*, 35 Am. St. Rep. 144. Property is presumed to be common property where it is not shown to belong to either spouse: *Peck v. Brummagin*, 31 Cal. 440, 89 Am. Dec. 195; *Morris v. Hastings*, 70 Tex. 26, 8 Am. St. Rep. 570.

MORTON v. ADAMS.

[124 CALIFORNIA, 229.]

JUDGMENT LIEN—CONTINUANCE OF, AFTER DEATH OF JUDGMENT DEBTOR.—A judgment docketed against the judgment debtor during his lifetime does not cease to be a lien upon his death, but continues to be a lien for the period prescribed by statute as the lifetime of judgment liens.

JUDGMENT LIEN—CLAIM AGAINST ESTATE—INCONSISTENCY.—It is not inconsistent with the continuance of a judgment lien, after the death of the judgment debtor, that the judgment must, as required by law, be presented as a claim against the estate of the judgment debtor, to be paid in the due course of administration, and that it is not enforceable by execution.

JUDGMENT LIEN—CLAIM AGAINST ESTATE—DESTRUCTION OF LIEN—MERGER.—The presentation and allowance of a judgment as a claim against the estate of the judgment debtor does not destroy the lien of the judgment by merger in the allowance of the claim, or otherwise.

JUDGMENT—CLAIM AGAINST ESTATE—MERGER.—The allowance of a claim against an estate is not, in any true sense, a judgment; and none of the grounds upon which one judgment has been held to be merged in another apply to the allowance of a judgment as a claim against an estate.

J. C. Bates, for the appellant.

Van Ness & Rodman, for the respondents.

229 PRINGLE, C. Suit to quiet title. Plaintiff is owner of the land. Defendant, London and Lancashire Insurance Company, claims a lien by judgment upon it. The following are the facts: The said defendant recovered a judgment against Emeline Wallace on March 13, 1896. She was then the owner of the land; and the judgment was duly docketed, and became a lien upon it. Emeline Wallace conveyed the land to plaintiff, subject to the lien of the judgment, and died on May 26, 1896. Administration was taken out, and the judgment was presented as a claim against her estate, and the claim allowed on September 24, 1896. The defendant in its answer sets up the lien of the judgment, and in a cross-complaint prays a foreclosure of the lien. The court finds that the lien is a valid and existing lien upon the ²³⁰ property, but grants no other relief to the defendant. Thus, no question of procedure is involved, only the existence of the lien. The plaintiff appeals, and contends: 1. That the judgment ceased to be a lien on the death of Emeline Wallace, the judgment debtor; 2. That the presentation of the claim against her estate destroyed the lien, if any existed.

1. Is the lien released by the death of the judgment debtor?

The burden is on the appellant to overcome the express provision of the Code of Civil Procedure, section 671: "The lien continues for five years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases." But other sections of the code confirm rather than negative the continuance of the lien after the death of the debtor. Section 669 of the Code of Civil Procedure, in making provision for the entry of a judgment, says: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment is not a lien upon the real property of the deceased party, but is payable in the course of administration on his estate." And in the title devoted to estates of deceased persons the same provision is re-enacted: Code Civ. Proc. sec. 1506. It is impossible to resist the effect of this express provision as implying that the judgment in other cases is a lien. If every judgment ceased to be a lien upon the death of a debtor, why make special provision that this judgment, rendered upon a decision made before the death, should not be a lien?

There is also an apparent recognition of the continuing lien of judgments in section 1643 of the Code of Civil Procedure. In that section, in making provision for the payment of debts, there is given to "judgments rendered against the decedent in his lifetime" the same preference against the general assets which is given to mortgages against the particular property covered by the lien of the mortgage. The payment of judgments "in the order of their dates" is the enforcement of their liens. And, what is more persuasive still, to the same end is the following provision of section 1505: "A judgment creditor, having a ²³¹ judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution in like manner and with like effect as if the judgment debtor were still living." This provision, read in connection with the definition of a redemptioner (Code Civ. Proc., sec. 701, subd. 2), is a recognition of the existence of the posthumous judgment lien. It might be argued that such a provision is unnecessary if the continuance of the judgment lien were an admitted and recognized fact. But the provision is a part of the section which provides that no execution shall issue upon the ordinary money

judgment, but that the judgment must be presented as a claim against the estate; and then, as if to give assurance that the judgment loses no other attribute, comes this provision that the right to make redemption (to which the existence of a lien is essential) remains unimpaired. The concurrent provisions of the general practice and of the probate procedure seem to leave no doubt of the intention of the code not to extinguish the lien upon the death of the debtor. The only apparent uncertainty arises from the fact that the judgment is required to be paid by the executor or administrator in the course of administration, and is not enforceable by execution. But this provision is not inconsistent with the continuance of the lien; and within the provision itself lies, as we have seen, a quasi recognition of the lien in ranking it with the recognized lien of the mortgage. To look at the consequences of any other conclusion than the above is to find additional confirmation for that conclusion. If the judgment debtor could transfer his property and then die, leaving to his creditor the barren remedy of a claim against a depleted estate, judgment liens, which have been so much favored by the enactment of 1895, would lose nearly all their value. A judgment lien has always been regarded as the highest form of security to a creditor. But, if its vitality is to depend upon the life of the debtor, whose death could thus be turned to profit, the judgment security must be remodeled.

As an argument against the existence of a lien, the appellant invokes the alleged absence of any provision of its enforcement, insisting that it is not embraced within the intent of section 1500. The construction of that section is not involved in this ²³² appeal, nor is the method of enforcement. But the continuance of the lien is too clearly within the intent of the other sections reviewed to be affected, in any aspect of this question, by this negative argument of the appellant.

2. Do the presentation and allowance of the judgment as a claim against the estate destroy its lien? This question is substantially answered by the above, especially by the strong implication of section 1506. Every judgment must be presented as a claim. If the presentation and allowance destroy the lien of the judgment, why does section 1506 make provision that judgments rendered after the death shall not be liens? The necessity of presentation applies to judgments rendered before as well as after the death. If the presentation is to destroy all liens, why say industriously in either case that there is no lien?

The learned counsel for the appellant contends that the

judgment is merged in the allowance of the claim, and therefore its lien destroyed. He cites the familiar cases which have held that for some purposes, such as bearing interest, the allowance of a claim is equivalent to a judgment, and from that contends that one judgment is merged in the other. The argument is not technically correct. For the allowance of a claim is not in any true sense a judgment. The first case cited by appellant is *Estate of Glenn*, 74 Cal. 568. That case refers to and cites "numerous decisions which hold that for some purposes the allowance of a claim is a judgment"; admits that "the allowance is not conclusive upon the heirs," and cites *Magraw v. McGlynn*, 26 Cal. 420, to the effect that "claims so allowed and approved pass into judgments of a qualified character only." In the next case cited by appellant—*Walkerley v. Bacon*, 85 Cal. 140—a claim was allowed for only half of the amount for which it was presented. The court below held that the acceptance by the plaintiff of the partial allowance of the claim prevented his recovery of the balance. This might have given countenance to appellant's theory that the allowance had the effect of a judgment in which the claim was merged. But on appeal the ruling of the court was reversed. In no sound or reasonable sense could it be held that, under our probate procedure, there is such a merger of the judgment in the allowed ²³³ claim as would destroy the lien of the judgment. That would make the creditor's security retrograde, rather than advance, by the merger. The essential idea of the merger is a benefit to the creditor, to give him a stronger and better position. The usual examples of merger are the absorption of a lesser estate in a larger one, and, as applied to demands, the absorption of the lower security in the higher—a promissory note, for instance, in a judgment. This original idea of the merger was at first rigidly adhered to; and many courts refused to recognize the merger between securities of equal degree. On that account one judgment was held not to be merged in another judgment based upon it. But many later cases have held that where one judgment is the cause of action on which another judgment is based, the first judgment is merged in the second, upon the ground that it would harass the defendant unnecessarily to allow two judgments to stand against him with the same remedies—that is, as has been said, would be to injure the defendant without benefit to the plaintiff. It has been held, however, that this merger would not be allowed to have the effect of extinguishing the lien of the first judgment when it is nec-

essary to preserve priorities: Hay v. Alexandria etc. Ry. Co., 20 Fed. Rep. 15. It is plain that none of the grounds upon which one judgment has been held to be merged in another apply to the case of the allowance of a claim under our probate procedure. A case in very close analogy to the present one is Hardin v. Melton, 28 S. C. 38. In that case, Mrs. Wright, a judgment creditor, had presented her judgment to the administrator of the estate of the debtor upon a call made by him for the creditors to establish their demands. Other junior judgments, sufficient with the judgment of Mrs. Wright to exhaust the assets of the estate, were presented to the administrator. After this presentation Mrs. Wright caused execution to be levied upon property which had been owned by the judgment debtor at the time of the entry of the judgment, but which, as in this case, had been afterward sold by him subject to the lien of the judgment. The court says: "The respondent contends, secondly, that if the judgment ever had lien it was lost when it was established against the estate of the deceased debtor under the call for creditors by the doctrine of merger. It may be true ²³⁴ that when a judgment creditor comes in under such a call, that his lien on the assets being administered, the proceeds of property over which he may have a lien or otherwise may be regarded as abandoned, but he is compensated by being entitled to be paid according to the date of his judgment, and, therefore, is no way injured. But to say that his lien over all of the property of the debtor, real and personal, whether the subject of administration or not, is also lost, is a startling proposition, and one which we think is without support in the decided cases." An injunction at the suit of the purchaser to restrain the sale by Mrs. Wright under her judgment was dissolved.

The circumstances of the present case are the reductio ad absurdum of the appellant's argument of her contention that the presentation of a judgment to the estate of the judgment debtor who has conveyed the property in his lifetime and whose estate is not shown to have any other asset, destroys, under the guise of the equitable doctrine of merger, the only security which the creditor had for his debt.

I advise that the judgment be affirmed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

JUDGMENT LIEN—CONTINUANCE OF, AFTER DEATH OF JUDGMENT DEBTOR.—A judgment obtained against a party in his lifetime creates a lien against all the real property held by him, and is not dissolved by his death, but may be satisfied out of his land in the hands of his heirs or devisees: Note to Hampton *v.* Cook, 62 Am. St. Rep. 197; note to Kimball *v.* Jenkins, 89 Am. Dec. 242, 243, on judgment lien after the death of the defendant; Union Bank *v.* Powell, 3 Fla. 175, 52 Am. Dec. 367.

JUDGMENT LIEN—DEATH OF JUDGMENT DEBTOR—EFFECT OF.—By the statute of Arkansas, on the death of a judgment debtor, his real property becomes subject to the exclusive jurisdiction of the probate court, to be disposed of under its authority, notwithstanding existing judgment liens thereon: Hampton *v.* Cook, 64 Ark. 353, 62 Am. St. Rep. 194. As to like statutes of other states making a judgment lien enforceable out of the estate as a preferred claim, see note to Kimball *v.* Jenkins, 89 Am. Dec. 243.

CLAIMS AGAINST ESTATE OF DECEDENT—WHAT NEED NOT BE PRESENTED.—A JUDGMENT against a decedent is not such a claim as must be presented to the executor or administrator, and rejected before suit can be brought on it, particularly where the judgment has been kept alive, and its lien has been preserved: Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784. Compare Fallon *v.* Butler, 21 Cal. 24, 81 Am. Dec. 140. The allowance and approval of a claim against a decedent's estate is a quasi judgment and has the force and effect of a judgment, but no execution can issue thereon: See monographic note to Moore *v.* Hillebrant, 65 Am. Dec. 122, 123, on the effect of an allowance of a claim against an estate—when and against whom conclusive. As to the method of enforcing a judgment lien against the estate of a decedent, see note to Kimball *v.* Jenkins, 89 Am. Dec. 242, 243.

BRITTAN *v.* OAKLAND BANK OF SAVINGS.

[124 CALIFORNIA, 282.]

PLEDGE—RESPECTIVE RIGHTS OF LIENHOLDER AND PLEDGEE'S ASSIGNEE.—A lienholder who refuses, upon proper demand, to deliver the property without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after an action is commenced; but a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser, who will be allowed to hold the property until the extinguishment of the original obligation.

PLEDGE OF BANK STOCK BY AGENT—INVALID SALE BY PLEDGEE—RIGHTS OF PURCHASER.—If an original owner of bank stock indorses it in blank and delivers it to his agent, with power to negotiate or pledge the same, a pledgee of such agent, who afterward takes the stock in good faith and for value, though the agent pledges it for his own individual benefit, has a special property in it and not a mere lien thereupon. He does not, therefore, lose all rights and interest therein by an invalid private sale thereof. The purchaser becomes a transferee of the pledge, and is entitled to hold it with the rights of the original pledgee, until the original obligation is extinguished.

PLEDGE OF BANK STOCK BY AGENT—STATUS OF OWNER—LIABILITY FOR MONEY ADVANCED.—If an original

owner has indorsed bank stock in blank and delivered it to his agent, with power to negotiate or pledge the same, he cannot recover from a pledgee of such agent, who afterward takes the stock in good faith and for value from the agent, who pledges it for his own individual benefit, without refunding, or offering to refund, the amount advanced by the second party to whom it is so pledged.

ASSIGNMENT OF SHARES OF BANK STOCK—WHEN GOOD.—It is a good assignment of shares of bank stock to deliver the certificate thereof, with a blank transfer on the back of it, to which the holder has affixed his name. The party to whom it is delivered is authorized to fill up the blank indorsement.

PLEDGE—CONVERSION OF PLEDGED BANK STOCK—ACTION FOR—INADMISSIBLE EVIDENCE.—If a bank receives, from an owner's agent, by way of pledge for the agent's individual benefit, a certificate of bank stock, indorsed with the owner's name in blank, and sells it at an invalid private sale, whereupon the owner sues the bank for a conversion of the stock, and the pledgor, the agent, has, in the meantime, become insolvent, evidence of an assignment by the bank of its claim in the insolvency proceedings against the insolvent pledgor, after applying the proceeds of the illegal sale to the pledgor's account, and of the assignee's re-assignment thereof to the plaintiff in the action for conversion, is not admissible in evidence in the latter action, for it is not relevant to the issues involved.

APPEAL—REFUSAL OF LEAVE TO AMEND—ABUSE OF DISCRETION.—The matter of granting or refusing leave to amend a pleading is very largely in the discretion of the trial court, and its action in refusing such an application is not reviewable on appeal where no abuse of discretion is shown.

PLEDGE OF BANK STOCK BY DIRECTOR OF BANK—VIOLATION OF STATUTE PROHIBITING DIRECTOR FROM BORROWING FUNDS OF BANK—EFFECT OF.—The violation of a statute providing that no director of a savings bank shall borrow its funds, and that, if he does so, his office shall become vacant, is a matter of which the state or sovereign power only can take advantage, particularly after the transaction is executed. It does not prevent the bank from maintaining an action to recover the money. Hence, it cannot be invoked to defeat a pledge of stock made by such director, for money borrowed from the bank, and the bank can hold the pledged stock, or its proceeds, in a suit for the recovery of the same, until the money loaned upon the faith of the pledge is repaid.

APPEAL—CONFLICT OF EVIDENCE AS TO FACTS—ASSUMPTION OF FACT AS FOUND BELOW.—In a case where there is a substantial conflict of evidence as to a fact, the appellate court will assume it to be as found by the jury, in its verdict.

James L. Crittenden, for the appellant.

Dunne & McPike, for the respondent.

284 VAN DYKE, J. The action here is conversion. The facts of the case, as admitted, not controverted, or established by a preponderance of the testimony, are as follows: In December, 1881, and prior and subsequent thereto, A. W. Bowman was the agent of the plaintiff herein to collect rents, pay taxes, and supervise his various properties. The plaintiff was the owner

of one hundred and twenty shares of stock of the Bank of California, represented by certificate No. 17, and in December, 1881, or the beginning of January, 1882, as he testifies, he assigned this certificate in blank to said Bowman for the purpose of raising some money. Bowman was at this time, and prior thereto had been, a director in the defendant bank, and was in the habit of borrowing large sums of money from said bank on securities, generally in the shape of stocks put up by way of pledge. In the latter part of January or the fore part of February, 1882, Bowman presented to the cashier and president of the defendant bank the certificate in question, so indorsed to him in blank by the plaintiff. The certificate was received and placed to the account of Bowman, entitled "overdraft account," and money was thereupon or thereafter advanced and other transactions had the same as theretofore, up to the time of Bowman's failure in 1884. On October 15, 1884, the defendant bank surrendered the certificate of stock No. 17 to the Bank of California, and had a new certificate, No. 809, issued to it in place thereof for the shares represented in the old certificate and held by it in pledge. Neither the defendant bank nor its officers other than director Bowman had any notice or knowledge of the fact that the certificate in question was the property of the plaintiff up to the demand made by him October 17, 1884. On October 17, 1884, the plaintiff made a demand on the defendant for the stock in question as the owner thereof, which demand was refused. October 27, 1884, the petition of certain creditors of Bowman was filed to have him adjudged an insolvent, and thereafter, in the usual course, he was so adjudged insolvent. At no time from the date of the transfer of the certificate to the bank was the account of Bowman for moneys advanced to him by the bank reduced below the amount of the securities, including the certificate in question, and his account showed that between July, 1884, and January, 1885, it was not less than forty-two thousand five hundred dollars, and, deducting the pledged stock, it was in the neighborhood of twenty-four thousand dollars. This action was brought originally November 7, 1885, by Frank Allyn, as assignee of the plaintiff, against the present defendant, the Bank of California, said Bowman and other parties. The complaint was amended several times, and finally on the third amended complaint and the answer thereto the action was tried. Before the third amended complaint was filed Bowman died, and Allyn, the former plaintiff, reassigned to the present plaintiff, who was substituted in his place, and

all the other defendants, excepting the respondent here, were omitted from the complaint on which the action was tried. In April, 1895, the action was tried before a jury, and a general verdict rendered in favor of the defendant. An appeal was had to this court from the judgment, upon the judgment-roll (Brittan v. Oakland Bank, 112 Cal. 1), and the judgment affirmed. This appeal is taken from the order denying plaintiff's motion for a new trial.

Between the time of the demand made by the plaintiff on the defendant bank for the stock in question and the bringing of the action, to wit, in August, 1885, the defendant bank sold the stock at private sale, without notice, for the sum of eighteen thousand nine hundred and forty-one dollars, which, with interest, deducted from the amount then due the bank from Bowman, left a balance of twenty-four thousand dollars. In May, 1887, defendant bank assigned its claim against the Bowman estate in the insolvency proceedings to W. H. Chickering for four thousand six hundred and sixteen dollars and seventy-three cents, and at about the same date Chickering assigned the same to the plaintiff Brittan.

²⁸⁶ 1. One of the contentions of the appellant is, that the defendant bank, having sold the stock at private sale, without complying with the requirements of the code, thereby lost its lien and all interest in said stock. But the case here is not that of a mere lienholder or bailee, but is a case of pledge. The stock, as already shown, was indorsed in blank by the plaintiff to Bowman. Plaintiff dealt with Bowman and not with the defendant bank. The account as furnished by Bowman to the plaintiff of his transactions as his agent, as given in evidence, shows this. A further fact going to show that the plaintiff dealt entirely with Bowman, and not with the bank, is that plaintiff filed his claim against Bowman on the balance of his account, in the insolvency proceedings against Bowman, including this same stock as certificate No. 17, and drew from the insolvency court, through the assignee in insolvency, a dividend or payment on said claim. There was also in evidence an affidavit by the plaintiff for the arrest of Bowman at the time of his failure, for the crime of embezzling the stock in question. In that affidavit he said that Bowman "then and there was the agent of deponent, and by virtue of his employment as such there came into the care and custody of him, the said A. W. Bowman, one hundred and twenty shares of the capital stock of the Bank of California which said certificate of stock

was indorsed in blank by deponent, and was then and there of the value of one hundred and sixty-five dollars per share, in all of the value of nineteen thousand eight hundred dollars, all in lawful money of the United States, and the said A. W. Bowman, while then and there having as aforesaid the control and care of said shares of stock and the aforesaid certificate, did then and there fraudulently appropriate the same to his own use." This verified complaint or affidavit was filed on the eighteenth day of October, 1884, being the next day after plaintiff's demand on the defendant bank, and on the twentieth day of the same month, two days thereafter, he brought an action against the present defendant, Bowman, and the Bank of California, for an injunction, in which it is also alleged that for a long time prior to the fifteenth day of October the defendant Bowman was the agent of the plaintiff in and about the care and management of the plaintiff's business, and as such agent ²⁸⁷ had the care and custody of the said stock, which was indorsed to him in blank, giving the value thereof, the same as in the preceding affidavit.

This court, in *Williams v. Ashe*, 111 Cal. 180, distinguishes between a mere lienholder and a pledgee. In that case Ashe turned over certain horses to one Kelly in pledge as security for a sum of over four thousand dollars, and, after holding them some time and becoming dissatisfied with the first arrangement, Kelly claimed them as owner, and as such sold and delivered them to the plaintiff Williams. Williams supposed he was buying the horses absolutely, and both he and Kelly testified that the sale was intended as an absolute sale. Nevertheless, it was found that the transaction between Ashe and Kelly was that of a pledgor and pledgee. Ashe having got possession of the horses, Williams brought an action to recover them. The jury in the case returned a verdict for the plaintiff, Williams, for the return of the property, and found the value of his interest in said property to be the sum of four thousand nine hundred and nine dollars and seventy-four cents. The judgment following this verdict was for the return of the horses to plaintiff, and decreeing a lien upon them for the sum named. Defendant Ashe appealed from the judgment. In the opinion of this court it is said: "Williams, it is to be remembered, is suing primarily for the recovery of the possession of the horses, and is basing his claim upon an absolute purchase of them from Kelly. Kelly insists that he was the owner and sold the horses (and not any pledgee's interest in them) to Williams; that

Ashe's debt to him had been completely extinguished, and that the relation of creditor and debtor did not exist between them at the time he made the sale. Ashe, upon the other hand, has the horses in possession, and asserts that Kelly was but a pledgee; and having sold contrary to his rights as pledgee, having repudiated the pledge and asserted ownership, in short, having made a wrongful conversion of the property, the lien is extinguished and he is entitled to retain possession against both of them. So far as concerns the rights of one who has a mere lien, as distinguished from one who claims as pledgee, the question has been answered repeatedly. It is the general rule that a lienholder who refuses upon proper demand to deliver the ²⁸⁸ property without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after action commenced. It is so held in this state by the cases of *Lehmann v. Schmidt*, 87 Cal. 15, and *Sutton v. Stephan*, 101 Cal. 545, and from the number and uniformity of the authorities examined it may with safety be said that this rule is universal. Section 2910 of the Civil Code enunciates the same principle.

"It is also the rule that if one having but a lien is sued in replevin, and answers claiming absolute ownership, he will not be permitted upon the trial to assert any right as lienor. His lien is absolutely lost: Citing a number of cases from other states. . . . The latter rule is, however, subject to this manifestly just limitation that if one who has claimed as owner is afterward proved to have but a lien, he shall not thereafter be deprived absolutely of his lien if his claim was honestly, though mistakenly, entertained and pressed; but before he can be allowed his lien he must abandon the false claim of ownership." Again: "But in the case of a pledgee the rule is otherwise. The reason for the distinction seems to be based upon two considerations: 1. That the pledgee has a special property in the chattels which the other class does not possess; 2. That a contract of pledge carries with it the implication that the security may be sold to discharge the obligation, while in case of a lien (except as aided by statute) the right of lien is not understood to carry with it any general right of sale: Story on Bailments, secs. 311-325. But whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser who will be allowed to hold the property until the extinguishment of the original obligation."

The sale in this case, not being in accordance with law, simply passed to the purchaser the rights held by the defendant bank, and if suit had been brought against such purchaser by the plaintiff, he would have been required to pay or tender only the same sum that he is required to pay or tender as against the defendant bank, the pledgee. This court, in the case of *Williams v. Ashe*, 111 Cal. 180, says: "But after this brief consideration of a few of the cases it remains to be added that in this state ²⁸⁹ the question was early considered and decided in accordance with the foregoing views. In the case of *Dewey v. Bowman*, 8 Cal. 145, wherein it is declared that if a pledgee sells the property absolutely without demand or notice to one having full knowledge of his title, while the absolute title does not pass, still the property remains in the hands of the purchaser as a pledge, with the rights to the purchaser which were enjoyed by the original pledgee": See, also, *Belden v. Perkins*, 78 Ill. 449; *Talty v. Freedman's Sav. etc. Co.*, 93 U. S. 321. The plaintiff having transferred or indorsed the stock in blank and delivered the same to his agent, with power to negotiate or pledge the same, cannot recover from a pledgee of such agent who took it in good faith and for value, without refunding or offering to refund the amount advanced by the second party to whom it was so pledged. In *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, it was held that an innocent subpledgee was entitled, as against the original pledgor, to hold the stock for the full amount advanced by the subpledgee. The opinion proceeds: "Where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the parties with whom they deal directly, but are derived from the acts of the real owner, which preclude him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." Again: "The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts. . . . A blank transfer on the back of the certificate to which the holder has affixed his name is a good assignment, and a party to whom it is delivered is authorized to fill it up by writing a transfer

and power of attorney over the signature": Civ. Code, sec. 2991.

2. Another contention on the part of the appellant is that the court below erred in excluding the defendant's assignment²⁰⁰ to Chickering and Chickering's assignment to plaintiff of the claims of the defendant against Bowman and his insolvent estate. The basis of this contention, as appears in the briefs, and by the oral argument of the appellant's counsel, is that by this sale the bank had no further claim against Bowman against which to offset or recoup the stock or the proceeds thereof.

As appears from the foregoing statement of facts, the original certificate of stock was surrendered to the Bank of California, and a new certificate issued to the defendant. This was held by the defendant in lieu of the former as a pledge to secure its account for money loaned Bowman; and this account was much greater than the value of the stock at the time of plaintiff's demand, October 17, 1884. When the plaintiff demanded the stock he made no offer to pay the indebtedness of Bowman for which it was held in pledge, or any part of it; and, the demand being refused, the defendant held the new certificate as such pledgee up to the sale of the stock in August, 1885. After the sale, as already stated, the proceeds thereof were applied on the Bowman indebtedness, leaving still a large balance of indebtedness from Bowman to the bank. The claim filed by the bank in the insolvency proceeding was long after this sale, and was for the balance only of the overdraft account or indebtedness of Bowman to the bank after deducting the proceeds of such sale. The amount received on the Chickering assignment was four thousand six hundred and sixteen dollars and seventy-three cents, as already stated.

Appellant, however, claims that the defendant could not apply the proceeds of the stock sold in August, 1885, to the overdraft account of Bowman, but was obliged to keep such proceeds in lieu of the stock, subject to the demand of the plaintiff. But the defendant did apply such proceeds to the Bowman account, and this action is brought for the conversion of said stock by reason of such sale, and the application of the proceeds by the defendant as aforesaid. Besides, the matter offered in evidence was not relevant to the issues presented by the last amended complaint and the answer thereto, on which the action was tried. It appears, however, that during the trial the plaintiff asked leave of the court to add a paragraph to his last amended complaint, pleading the matter of the assignment by

²⁰¹ the defendant of its claim in the insolvency proceeding of Bowman, but the court refused to grant such leave, and the appellant assigns this as one of the errors. The matter of granting or refusing leave to amend is very largely in the discretion of the trial court, and we cannot say that in this instance, taking into consideration the time when the application was made, there was any abuse of discretion to refuse the application.

3. At the time of the transaction between Bowman and the bank, as already stated, he was a director in the bank. The Civil Code, section 578, declares that no director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, and declares that the office of any director or officer who acts in contravention of this provision shall immediately thereupon become vacant. This, however, is of no advantage to the appellant, as the violation of the provision in question could only be availed of at the instance of the state or sovereign power: *Jones v. Guaranty etc. Co.*, 101 U. S. 628; *National Bank v. Matthews*, 98 U. S. 621. Besides, the transaction was executed. In *Savings Bank v. Burns*, 104 Cal. 473, the court in answering a similar contention that the transaction was void as being in contravention of the provision of the code, says: "We do not think this contention can be sustained. The obvious purpose of the section of the code invoked and relied upon was to protect savings banks and their depositors. To hold, therefore, that if the deposits or funds of such a bank should be borrowed by any of its officers, directly or indirectly, no action could be maintained by the bank to recover the money, would often work out great injustice and wrong." The bank, therefore, could have sued Bowman to recover back the money loaned, and it can hold the pledged stock or its proceeds in a suit for the recovery of the same until such money lent on the faith of such pledge is repaid.

4. Appellant contends that the evidence is insufficient to support the verdict, in that the evidence, as claimed, shows that when the plaintiff demanded the stock, defendant asserted the unqualified ownership thereof, and refused to deliver it on that ground. This is contested by defendant, and there is a substantial ²⁹² conflict in the evidence in reference to this, and the jury found by its verdict for the defendant. In such case

it must be assumed by this court that the facts are in accordance with the defendant's contention on this point.

5. Appellant challenges the correctness of some of the instructions given at the request of the defendant, and of the refusal to give other instructions offered by the plaintiff, and also some of the court's charges to the jury. But, taking the instructions and charges altogether, they presented the case fairly to the jury.

It will not be necessary to notice in detail the other points presented on behalf of the appellant. It is sufficient to say that we see no errors in any of them prejudicial to the appellant or which would justify a reversal.

The order denying a new trial is affirmed.

Harrison, J., and Henshaw, J., concurred.

ASSIGNMENT OF CORPORATE STOCK.—That a certificate of stock in a corporation, transferred in blank, is not a negotiable instrument, see *Shaw v. Spencer*, 10 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 652. But certificates of stock are assignable, and pass by indorsement; and, as a corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof, the holders of such certificates are prima facie presumed to be the bona fide owners: *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586. Compare note to *Young v. South Tredegar Iron Co.*, 4 Am. St. Rep. 759; and monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 390, on to what extent transfers of stock may be restricted. That a power to transfer stock, made in blank, is valid, see *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317. A transfer is valid, where the owner of bank stock delivers a certificate thereof, with an indefinite power of disposition, in blank, to her agent, who, representing it as his own, transfers the certificate and power to purchase in course of business, as payment for a loan: *State Bank v. Cox*, 11 Rich. Eq. 344, 78 Am. Dec. 458.

PLEDGE OF CORPORATE STOCK.—Shares of stock in a corporation may be pledged like other personal property: *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161. As between the parties to a pledge of shares of corporate stock, the pledge may be effected by indorsement and transfer of the stock certificates, but when that mode of creating a pledge is adopted, it is subject to the rules governing the pledging of other instruments: *McFall v. Buckeye etc. Assn.*, 122 Cal. 468, 68 Am. St. Rep. 47. A pledgee of corporate stock has the right to retain it until the debt for which it was pledged is fully satisfied: *Cross v. Eureka etc. Canal Co.*, 73 Cal. 302, 2 Am. St. Rep. 808; *Fowle v. Child*, 164 Mass. 210, 49 Am. St. Rep. 451. A sale, by a pledgee of stock, without notice, and where the proceeds have been applied to the payment of the debt secured by the pledgor, does not amount to conversion, when: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87; *Dimock v. United States Nat. Bank*, 55 N. J. L. 296, 39 Am. St. Rep. 643.

PLEADINGS—AMENDMENT OF—DISCRETION OF COURT.—The matter of granting or refusing leave to amend a pleading lies

largely in the discretion of the court: *Note to Flanders v. Cobb*, 51 Am. St. Rep. 434; *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320; and its action is not reviewable, except for abuse of discretion: *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. Rep. 266; *Robbins v. Treadway*, 2 J. J. Marsh. 540, 19 Am. Dec. 152.

BISHOP v. McKILLICAN.

[124 CALIFORNIA, 321.]

RECEIVERS—REPLEVIN—LEAVE OF COURT—ATTACHMENT.—If a railroad company gives a mortgage upon its property, and subsequently acquires certain other personal property, which is attached by the sheriff upon the same day that an action is brought to foreclose the mortgage, a receiver, who has been appointed in the foreclosure proceeding, to take possession of the mortgaged property, cannot, without an order of court, maintain replevin to recover such personal property, where it has never been in his possession as receiver, but only as caretaker for the sheriff.

MORTGAGE OF STREET RAILWAY PROPERTY, INCLUDING REALTY AND PERSONALTY IN ONE INSTRUMENT—VALIDITY OF.—A mortgage of street railway property, including personalty as well as realty, not executed in conformity with the requirements of the statute concerning chattel mortgages, but only as a mortgage of real property, is void as to creditors of the mortgagor, who attach the personal property.

STATUTES—CONSTRUCTION—EXECUTION OF MORTGAGES ON RAILWAY PROPERTY.—Although one part of a code of laws, conferring upon railroad corporations the power to mortgage their property, fails to prescribe the mode of executing such mortgages, yet if the mode and manner of executing mortgages of real and personal property is pointed out in another part of the code, without exception in favor of any person or corporation, the mode and manner thus pointed out must govern as to the execution of railway mortgages.

Edward J. Pringle, for the appellant.

Sidney V. Smith, Olney & Olney, and Warren Olney, for the respondent, Oregon Improvement Company.

Reed & Nusbaumer, for the respondent, Robert McKillican.

Fitzgerald & Abbott, for the respondent, Daniel Dwyer.

322 VAN DYKE, J. In 1890 the Consolidated Piedmont Cable Company, a corporation operating a street railroad in Oakland, executed a mortgage to the California Title Insurance and Trust Company, by its terms including all track and tracks, together with all depot grounds, buildings, machinery, workshops, dummies, cars, rolling stock of all kinds, full equipments, tools, fixtures, and other property, which is now or may hereafter, in whole or in part, be constructed, completed, purchased, acquired, ³²³ held, or owned by the mortgagor, pertaining to

the said railroads, and all the corporate rights, privileges, and franchises of the mortgagor pertaining to said roads, or any of them. This mortgage was acknowledged and recorded as a real estate mortgage, and contained no affidavit, nor was it recorded as required by the Civil Code in reference to chattel mortgages. Afterward, it is claimed by appellants, the railroad company acquired certain rolling stock, two bundles of wire cable, some old iron and office furniture. On the first day of November, 1893, the Oregon Improvement Company, a creditor of the railroad company, brought suit against said railroad company and caused an attachment to be issued therein. Under this writ of attachment, and on the same day, to wit, the 1st of November, 1893, McKillican, as sheriff of Alameda county, by virtue of said writ of attachment, levied upon and seized the personal property last above mentioned.

On the same day, to wit, November 1st, in an action brought by the California Title Insurance and Trust Company, a corporation, against the said Consolidated Piedmont Cable Company to foreclose said mortgage, the plaintiff herein was appointed receiver, with "authority to continue the business of the Consolidated Piedmont Cable Company, and as incident thereto to create such indebtedness as may be necessary in conducting said business, and with the powers incident to the office of receiver."

On the trial of this action in the court below it was stipulated that certain allegations in the answer were true, and that the property described in the complaint herein was held by the defendant McKillican, as sheriff of the county of Alameda, under an attachment issued against the Consolidated Piedmont Cable Company at the suit of the defendant herein, the Oregon Improvement Company, and the further following stipulation is entered into between the parties:

324 "OREGON IMPROVEMENT COM-
PANY,

Plaintiff,

v.

"CONSOLIDATED' PIEDMONT CA-
BLE COMPANY,

Defendant.

"Whereas, in the action now pending in the above-entitled court, wherein the California Title Insurance and Trust Com-

pany is plaintiff, and the above-named defendant is also defendant, the undersigned has been appointed receiver of the property and assets of the above-named defendant, and has taken charge of all the property of the defendant, except such as was in possession of Robert McKillican, sheriff of Alameda county, under and by virtue of a writ of attachment levied in the above-entitled action;

"And, whereas, the undersigned has taken possession of all the property of the defendant, but subject to the above-mentioned levy, and it is the intention of the California Title Insurance and Trust Company, the plaintiff in the action wherein the undersigned was appointed receiver, to test the validity of the prior attachment levied in the above-entitled action; and it is desirable that the property belonging to the said defendant be used by the receiver, subject to any lien which the above-named plaintiff may, by virtue of the levy under said writ of attachment, have; and it is also desirable that expense be saved in caring for the said property:

"Now, therefore, I, the undersigned, receiver as aforesaid, do hereby acknowledge that I have received possession from the said Robert McKillican, sheriff as aforesaid, as caretaker for him, of the personal property levied upon by him under the writ of attachment in the above-entitled action, and I do hereby agree to restore the same to the possession of the said Robert McKillican, sheriff, whenever he shall demand of me so to do.

"But this receipt shall not prejudice any claim which I, as receiver, may make, that said levy of a writ of attachment is inferior in right to any claim as receiver.

"Dated Oakland, November 1, 1893.

"(Signed)

IRA BISHOP.

325 "To Robert McKillican, Sheriff:

"If Ira Bishop, receiver, et cetera, will sign the foregoing receipt you are at liberty to appoint him caretaker of the property levied upon by you, and the plaintiff will acquit you of any claim for damages arising from any act of his.

"Dated November 1, 1893. SIDNEY V. SMITH and

"WARREN OLNEY,

"Attorneys for Oregon Improvement Company."

"And after the execution of the stipulation the property up to the time of levy of execution was used or held under and in pursuance to the terms of the stipulation.

From the facts, as appears in the record, the plaintiff never had possession of the articles sued for as receiver, or in any other way, except as the servant of the defendant McKillican, as sheriff, whereas the action seems to be based upon the theory that the property was in the possession of the plaintiff as receiver, and unlawfully and wrongfully taken from his possession by the defendants. As to this property, the possession of the receiver was never disturbed or interfered with. The facts, therefore, are not consistent with the plaintiff's theory of his cause of action. The only authority the receiver has for bringing this action is the order appointing him. That does not specially authorize him to bring a suit for the recovery or value of property withheld or converted of which he never was in possession. Beach on Receivers, sections 672, 673, says: "It has been formally adjudicated that a receiver, who has had possession of property by virtue of his appointment as such receiver by a competent court, may maintain an action of detinue for the property. Although such an action could not be maintained if grounded merely upon the right of property which may be claimed to vest in him by virtue of his appointment, yet, as a mere right of possession, is a sufficient basis upon which to found the action, and, as he is entitled to the possession, he may avail himself of this remedy. A receiver appointed in supplementary proceedings takes only an equitable right of redemption in chattels mortgaged by the judgment debtor when reduced to possession by the mortgagee before the commencement of the proceedings, and he cannot maintain replevin for such chattels against the mortgagee. In a recent case in England it was held ³²⁶ that the receiver of a pawnbroker's business was not entitled to the possession of redeemable pledges as against the sheriff who held them by virtue of a levy under execution made after the appointment of the receiver, but before he had perfected his security." In *State v. Gambs*, 68 Mo. 289, it is held that an action brought by a receiver could not be maintained because he had received no special authority entitling him to bring suit; Judge Henry adding: "A suit by a receiver to recover property of which he had obtained possession, but which has been taken from him, rests upon a different ground. In such a case his formal possession created a special property which would support the action." In *Tibbets v. Cohn*, 116 Cal. 365, this court says: "As a rule, however, the receiver cannot sue to recover property which has not come to his possession, or which, being in the possession of the defendant, ought to

have been delivered by him. He cannot maintain trover for property of the insolvent converted before the adjudication, nor to recover property transferred by the debtor in fraud of creditors. His appointment is intended to have the effect of a preliminary injunction to preserve the property. It does not appear that there was any order of the court directing or authorizing the suit."

Beach on Receivers, section 650, says: "The receiver has no right to sue, except by leave of the court which appointed him. Out of the established doctrine that a receiver is the officer of the court—"the hand") by which it executes its will in regard to the property in its keeping—is deduced the well-nigh universal rule that a receiver may not bring any suit without having first obtained leave of court." And since the appeal was taken in this case, in the action of California Title etc. Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237, it was held that moneys due the Piedmont Cable Company did not pass to the possession of the receiver by virtue of his appointment as such, and that the same were subject to and were attached by Albert S. Black, a creditor of said Piedmont company. The court say: "The mortgage did not cover the assets of the corporation due therein beyond the property as hereinbefore stated, and the receiver was appointed, not to collect the debts due the corporation defendant, but only to take possession of the mortgaged property, operate the road, et cetera. When, therefore, he took possession ³²⁷ of the money of the defendant and collected money due to it before his appointment, which was not covered by the lien of the mortgage, he transcended his authority as receiver." Under the order appointing the plaintiff as receiver he had no power to bring suits for the recovery of property, or to contest the right of property claimed to belong to the defendant corporation in the suit wherein he was appointed, which would or might involve risk or expensive litigation, without an order of the court to that effect.

The property in question in this action is personal and not real estate. The mode and manner of mortgaging chattels or personal property is pointed out in the Civil Code, sections 2950-2972. By section 2957 it is declared: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless: 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; 2. It

is acknowledged or proved, certified and recorded in like manner as grants of real property."

As already stated, the mortgage in question did not purport to be executed in pursuance of the requirements of the code concerning chattel mortgages, but only as a mortgage of real property. The first section of the chattel mortgage provision specifies what articles of personal property may be mortgaged, and the first subdivision includes "locomotives, engines, and other rolling stock of a railroad"; the ninth, "growing crops." *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, was a case of a mortgage of growing crops. In that case a real estate mortgage had been executed, covering the land upon which the crops were grown, subsequent to the execution of the mortgage. The court say: "It is urged that sections 2950 and following of the Civil Code, providing for the manner of mortgaging growing crops, do not establish an exclusive method; that as this class of property may, under some conditions, be regarded as realty, and under other conditions as personalty, it must follow that under corresponding conditions the property may be the subject of a real estate mortgage or a chattel mortgage, according to the circumstances; and that plaintiff having a valid **328** mortgage upon the land, with its rents, issues and profits, this gives him a valid lien upon the growing crops, as effectually, to the same extent for all purposes, as if executed with the formalities required in the case of a crop mortgage. We are unable to coincide in this view. In the first place, we think it quite manifest from the provisions of the code in question that the legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purpose this species of property shall be regarded as chattels. There is nothing in the statute to indicate that it was not intended to cover every case of a mortgage given upon that class of property." Therefore, it was held the mortgage did not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. If this be "an exclusive mode for mortgaging growing crops," it is likewise as to the property in question here, as it belongs to the same category and is included in the same section. In *Southern Cal. etc. Road Co. v. Union Loan etc. Co.*, 64 Fed. Rep. 450, the circuit court of appeals, in modifying the opinion of the circuit court, held that a mortgage by a railroad company, under the authority conferred upon such companies by section 456 of the Civil Code, included personal property as

well as real estate, although executed and recorded as a real estate mortgage merely. The court, in deciding the case, say: "There is a great diversity of opinion upon this question in the different states where no express statute exists upon the subject. . . . Several states, owing to the conflict in the decisions of the courts, have settled the matter by direct legislation. . . . The Civil Code of California, in dealing with the subject of railroads and of corporate stock, provides that railroad corporations, for the purpose of constructing and completing roads, may, among other things, mortgage their corporate property and franchises. . . . There are no conditions attached to this power. It is absolute, and gives the railroad the right to mortgage personal as well as real property for the purpose mentioned, without encumbering it with any of the conditions attached to the chattel mortgage act." The same circuit court of appeals subsequently, in *Illinois Trust etc. Bank v. Seattle R. R. Co.*, 82 Fed. Rep. 941, had under consideration ³²⁹ the same subject matter of mortgaging chattels by a railroad company under the laws of the state of Washington. In that case the court held that the failure of the trust deed to comply with the chattel mortgage law of that state rendered the mortgage void as to the personal property. The statutes of that state contain provisions for mortgaging personal property or chattels similar to ours. The court, in deciding the case, say: "This court held that a statute of California relating to chattel mortgages similar to that of Washington did not apply where the mortgage of a railroad company covers personal property in connection with real estate and corporate franchises; but in both of these cases the exception was based upon the provisions of the statute conferring upon railroad corporations organized or incorporated under the laws of the state for public purposes the power to mortgage their franchises and real and personal property as an entirety."

Section 456 of the Civil Code is found in division 1, part 9, title 3, under the head of "Railroad Corporations." It is simply intended, as its language imports, to confer upon railroad corporations the power to mortgage their property. Being a corporation and the creature of law, it would possess no such power without direct authority given to it by law. The section does not in terms, however, as implied in the decision of the circuit court of appeals, confer power to mortgage "their franchises and real and personal property as an entirety," but simply confers the power to mortgage such property without pre-

scribing the mode. The same power is possessed by individuals. Still, it would hardly be claimed that an individual, owning a railroad and all the other property that ordinary railroad corporations own, could mortgage the whole property, real, personal and franchises, in one instrument as a real estate mortgage: See, also, *Hoyle v. Plattsburg etc. R. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595.

The mode and manner of executing mortgages, both of real and personal property, will be found in altogether a different part of the Civil Code from that concerning corporations, to wit, under division 3, part 4, title 14. In article 2 the mode of mortgaging real property is pointed out from section 2947 to section 2952, inclusive, and mortgages of personal property in ³³⁰ article 3, from sections 2955 to 2973, both inclusive, and it is declared in section 2957 that "a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless" executed, acknowledged, and recorded as in that article prescribed. No exception is contained in favor of any person, whether a natural person or a corporation, and the language is too plain to be misunderstood and requires no construction. It is intimated in the opinion of the circuit court of appeals referred to, that, if a state by statute has "settled the matter by direct legislation," the court would feel bound to follow it. We think that our state has settled the matter in the provisions of the code referred to, and that it is the duty of this court to follow the law as there laid down.

The judgment and order denying a new trial are affirmed.

STATUTES MUST BE CONSTRUED with reference to the whole system of which they form a part: *St. Louis v. Howard*, 119 Mo. 41, 41 Am. St. Rep. 630.

COUNTY OF LOS ANGELES v. HOLLYWOOD CEMETERY ASSOCIATION.

[124 CALIFORNIA, 344.]

CEMETERIES—ESTABLISHMENT AND MAINTENANCE OF, AS A LAWFUL OCCUPATION—INJURIOUS TENDENCY.—It is not unlawful to establish and conduct a cemetery for the burial of the dead, deriving profit therefrom, as a business enterprise. It cannot even be presumed that the business of conducting a cemetery is an occupation which has an injurious tendency.

CEMETERIES—REGULATION OF—NUISANCES PER SE.

While cemeteries are within the power of reasonable regulation by cities, counties, and towns, they are not to be regarded as nuisances per se, in measuring the extent of the police power to regulate them.

CEMETERIES—REGULATION OF, BY CITIES OR TOWNS, AND COUNTIES—REASONABLENESS—DISTINCTION.

An ordinance passed pursuant to the constitutional grant of power to make police regulations concerning cemeteries may be reasonable, when confined to the limits of a city or town, but entirely unreasonable when put in operation in all parts of a large county, thinly populated in many of its parts.

POLICE POWER—PROHIBITION—REGULATION.—Under the guise of regulating a business, a municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business.

POLICE POWER—REGULATION OF LAWFUL BUSINESS WITH NO INJURIOUS TENDENCY.—If a business, such as conducting a cemetery for profit, is lawful, and has no injurious tendency, the municipal authorities cannot say who shall and who shall not exercise the right to follow it. Hence, any restriction, by virtue of the police power, upon the rights of individuals to pursue it, must extend to all alike. The privilege of burial cannot be limited to one class of citizens, and denied to another class, within the same district.

CEMETERIES—ORDINANCE REGULATING—UNEQUAL OPERATION—INVALIDITY.—A county ordinance which makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the county without the permission of the supervisors, but which impliedly permits burials in cemeteries already established, without restriction, is invalid and not enforceable by the county. It is unreasonable, because it makes the right to follow a lawful occupation dependent upon the arbitrary will of the supervisors; and it is unequal in its operation, because it discriminates in favor of a class of persons within the same district; that is, it allows the owners of cemeteries already established the right to exercise privileges denied to those who have no permission; and whether the permission may or may not be granted, rests in the arbitrary power of the supervisors.

Edwin Baxter, for the appellant.

J. A. Donnell, Alexander Campbell, Willoughby Cole, Cole & Cole, and Silent & Campbell, for the respondent.

346 CHIPMAN, C. Injunction to restrain defendant from establishing a cemetery upon certain lands and interring human bodies therein. The complaint shows that the supervisors of Los Angeles county duly passed an ordinance, the first section of which reads: "It shall be unlawful to locate or establish, extend, or enlarge, any cemetery, graveyard, burying-ground or crematory within the limits of the county of Los Angeles without the permission of the board of supervisors first had and obtained." The second section directs how to apply for such permission and what facts shall be set forth in the petition therefor, and that thirty days' notice of the hearing of the peti-

tion shall be given by publication in some newspaper published in the county. The third and last section provides for publication of the ordinance. It is alleged that since said ordinance took effect defendant has located and is now locating and establishing a cemetery (upon certain lands described) situated in said county, "without the permission of the said board of supervisors first had and obtained, and contrary to and in violation of all the provisions of said ordinance"; the complaint then sets out certain acts now being done by defendant in furtherance of its said purpose, and that it "will continue in the work of locating and establishing such cemetery, in violation of said ordinance . . . and greatly to the injury of the entire neighborhood of the said location, unless restrained," et cetera.

Defendant answered the order to show cause by general demurrer to the complaint, and by certain affidavits, which latter were controverted by counter-affidavits. The demurrer was overruled, and the court granted an injunction as prayed for directing defendant to refrain from proceeding further to establish said cemetery, and from burying any human bodies in the land ³⁴⁷ described. Defendant appeals from the order overruling the demurrer, and from the judgment and order granting the writ, and from the writ.

The demurrer admits the allegations of the complaint, and raises the questions discussed by counsel. The trial court disposed of the case on the demurrer and on the sufficiency of the complaint. We shall, therefore, take no notice of the affidavits.

The contention of defendant is that the ordinance is violative of the fourteenth amendment of the federal constitution and of section 11, article 1, and section 11, article 11, of our state constitution; and is an unreasonable exercise of the power to regulate, and therefore invalid. The ordinance before us simply makes it unlawful to establish a cemetery without using it for the burial of the dead; and the complaint does not charge in terms that defendant has used its land, or is about to use it, for the burial of the dead. Counsel on both sides, however, and the court as well, treat the ordinance and the complaint as aimed not only at the dedication or establishment of the cemetery, but also at the burial of the dead therein. We shall, therefore, assume that the broader meaning of the word "cemetery" is intended in the ordinance and the complaint.

From the opinion of the learned judge who sat in the case (printed in the record), it is manifest that he regarded the estab-

lishment of a cemetery for the interment of human bodies "as an avocation which may be well presumed to have an injurious tendency." It is not so stated, but the opinion proceeds, I think, upon the presumption that a cemetery is a nuisance per se, or at least may be so regarded in measuring the extent of the police power to regulate it. We cannot concur in this view, nor can we concur in the position that the business of conducting a cemetery is an avocation presumably having an injurious tendency. We think, however, and in this we quite agree with the learned counsel for respondent, that there are many considerations, too obvious to require enumeration, which bring cemeteries within the power of reasonable regulation by both city and county municipalities.

Before proceeding further, it may be well to observe that this power of regulation given by our constitution to municipalities, ³⁴⁸ while alike conferred upon cities, towns, and counties, an ordinance passed pursuant thereto may be reasonable when confined to the limits of a city or town which would be entirely unreasonable when put in operation in all parts of a large county thinly populated in many of its parts. "Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in a county": Dillon on Municipal Corporations, sec. 327.

Article 11, section 11, of the constitution of this state, provides as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This section is re-enacted in the County Government Act, section 25, act of April 1, 1897: Stats. 1897, p. 452. Of this provision it was said in *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, as to cities and towns, that it is sufficiently broad and comprehensive to "sustain the enactment of any ordinance having a reasonable tendency to promote the health, comfort, safety, and welfare of all the inhabitants of the municipality, and which would not be in conflict with some general law."

Is the ordinance before us a reasonable exercise of the power conferred by the constitution and the statute upon boards of supervisors, and as applicable to counties? It cannot be assumed that the supervisors in the present case legislated with a view to reach the defendant's enterprise especially, or that they knew it was in contemplation when the ordinance was enacted. On the contrary, it must be presumed that their purpose was to promote the welfare of the inhabitants. The validity of the ordi-

nance must be determined from its face alone. The ordinance makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the county without the permission of the supervisors. It does not attempt to deal with or prohibit private interments, nor with interments in cemeteries already established. It declares that in no part of Los Angeles county, however remote from any city or town, even though the location be suitable for the purpose and entirely satisfactory to the neighboring inhabitants, no cemetery shall be established except by permission of the supervisors first obtained. As the ordinance is silent as to interments in cemeteries already established, it necessarily ³⁴⁹ permits burials in such cemeteries without restriction; and thus allows the owners of cemeteries already established the right to exercise privileges denied to defendant. It is not unlawful to establish a cemetery for the burial of the dead, deriving profit therefrom as a business enterprise. To provide for the repose of the dead is as lawful as to provide for the comfort of the living. There are reasons why the burial of the dead should be subject to reasonable regulation, which may not justify similar restrictions or regulations as to the homes of the living; but, we can see no more reason why the right to establish cemeteries in a county should be subject to the will of the supervisors than that the right to engage in any other lawful enterprise should be so circumscribed. There is a wide difference between regulation and prohibition—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality. It would hardly be contended that an ordinance declaring it to be unlawful to engage in the business of farming or merchandising in the county without the permission of the supervisors would be a reasonable exercise of legislative power, or could reasonably be said to be exercising the power to regulate. The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupations; they may regulate the manner of conducting the business if it be of a character tending to be injurious; but, if the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. We do not think it was ever

intended by the people in ordaining the section of the constitution referred to, or of the legislature in the statutory enactment, to include, in the power to make and enforce regulations, a power purely personal and arbitrary. "For," as was said by Matthews, J., in *Yick Wo v. Hopkins*, 118 U. S. 356, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable ³⁵⁰ in any country where freedom prevails, as being the essence of slavery."

In *Austin v. Murray*, 16 Pick. 121, the ordinance prohibited any person from bringing into the town of Charleston any dead body, or cause the same to be conveyed through the streets or to be buried on the premises of such person, without a permit from the selectmen of the town. The court said that if the by-law had been limited to the populous part of town and had been made in good faith "for the purpose of preserving the health of the inhabitants, which may be in some degree exposed to danger by the allowance of interment in the midst of dense population, it would have been a very reasonable regulation. But it cannot be pretended that this by-law was made for the preservation of the health of the inhabitants. Its restraints extend many miles into the country, to the utmost limits of the town. Such an unnecessary restraint upon the right of interring the dead we think essentially unreasonable."

In *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, the city council of Baltimore was granted power to pass ordinances to preserve the health of the city, to prevent and remove nuisances, prevent the introduction of contagious diseases within the city, and within three miles thereof regulate the places for manufacturing soap and candles, the erection of slaughter-houses and distilleries, "and wherever every other offensive trade is carried on." The city passed an ordinance making it unlawful for "any person . . . to work, operate, or continue in use, for the purpose of burning oyster shells or limestone, any kiln situated or erected within the limits of the city of Baltimore." The ordinance was held to be void because an absolute prohibition of a lawful occupation which might, on the remote outskirts of the city, be carried on without injury to anyone.

2. Aside from the objections just considered, the ordinance is unequal in its operation.

In *Ex parte Bohen*, 115 Cal. 372, an ordinance of the city and county of San Francisco made it unlawful for any person to

purchase or sell any land within the county for the purpose of interring any human body therein, but permitted interments in plots or lots belonging to persons, associations, or corporations for their families or members. The ordinance was held to be ³⁵¹ unreasonable and invalid, as assuming to limit the privilege of burial to one class of citizens and denying it to another class within the same district. It was further held that any restriction of the rights of the individual by virtue of the police power must extend to all individuals who might exercise the right. I am unable to distinguish this case from the one in hand. It is true the ordinance in Bohen's case expressly gave to the then owners of lots the right to use them for burial purposes while denying the right to any person who might thereafter purchase a burial lot. It differs from the Los Angeles county ordinance only by expressing in words what the latter clearly implies. Both ordinances discriminate in favor of a class of persons. The fact that the supervisors reserved the power to place all persons on an equality by granting permission does not relieve the ordinance from this objection. There is still a class with unrestricted rights which the other class may not exercise without permission; and whether this permission may or may not be granted rests in the arbitrary power of the supervisors. I can add nothing to the force of the reasoning in the Bohen case; and the authorities there cited, in support of the principles laid down, need no re-enforcement.

It is advised that the injunction be dissolved and the order overruling the demurrer be reversed, with directions to sustain the demurrer.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the injunction is dissolved and the order overruling the demurrer is reversed, with directions to sustain the demurrer.

Garoutte, J., Harrison, J., Van Dyke, J.

Hearing in Bank denied.

CEMETERIES—NUISANCE—INJUNCTION.—The burying of the dead in public cemeteries is not a nuisance, but might become so by careless and improvident modes of interment. Equity will not interfere, by injunction, unless the nuisance is clear, or has first been established in a court of law: *Ellison v. Commissioners*, 5 Jones' Eq. 57, 75 Am. Dec. 430.

POLICE POWER—LAWFUL BUSINESS—LAWS UNAUTHORIZED.—A law designed as an exercise of the police power, but

which amounts to an arbitrary and unwarranted interference with the right of a citizen to pursue any lawful business, must be declared unconstitutional: *State v. Chicago etc. Ry. Co.*, 68 Minn. 381, 64 Am. St. Rep. 482.

HITE v. HITE.

[124 CALIFORNIA, 389.]

MARRIAGE AND DIVORCE.—TO JUSTIFY ALIMONY, in an action for divorce, the marriage must be admitted or proved.

MARRIAGE AND DIVORCE—ALIMONY.—WHEN THE MARRIAGE IS DENIED, in an action for divorce, the marriage must be proved, before alimony can be allowed; and a *prima facie* showing made by the wife, when there is a counter showing, is not sufficient, for the judge should be satisfied, from the entire proof made, of the fact of marriage.

MARRIAGE AND DIVORCE—ALIMONY AND SUIT MONEY WHERE MARRIAGE IS DENIED.—If a woman, who claims to be a wife, brings an action for a divorce against her alleged husband, asking for alimony pendente lite, counsel fees, and expenses of suit, she is not entitled to such an allowance, where the defendant denies the marriage, until she satisfies the court, by a preponderance of the entire evidence introduced upon the hearing of her motion, that she is the wife of the defendant. It is not enough for her to make merely a *prima facie* case as to the existence of the marriage, regardless of the denials or proof produced by the defendant.

MARRIAGE AND DIVORCE—ALLOWANCE OF ALIMONY AND SUIT MONEY, WHERE MARRIAGE IS DENIED—REVERSAL OF ORDER.—As the fact of marriage must be proved by a preponderance of evidence, in an action for divorce, where the marriage is denied, an order made in such action, brought by a woman who claims to be a wife, against her alleged husband, who makes a complete denial of the marriage, allowing alimony and suit money upon a mere *prima facie* showing of the fact of marriage, made out by the averments of the complaint, depositions, and *ex parte* affidavits, will be reversed on appeal, where it is evident that the preponderance of the entire proof presented by both parties is against the fact of marriage, on the ground that the quantum of evidence necessary was not produced by the wife to support the fact of marriage, and that, if the trial court adjudged that there was a preponderance of evidence to support such fact, it was a plain abuse of discretion.

W. W. Foote, F. J. Castlehun, and Congdon & Congdon, for the appellant.

Rogers & Paterson, for the respondent.

389 TEMPLE, J. This is an appeal from an order allowing alimony and suit money in an action for a divorce.

Plaintiff contents herself in her complaint, so far as her cause of action is concerned, with the averment of her marriage to

defendant and a charge of adultery against him. Defendant denies the marriage, and avers that the person with whom he is charged to have committed adultery is his lawful wife. He also charges that plaintiff, since her alleged marriage to him, has had illicit relations with other men.

The order or judgment appealed from was made after notice and a hearing upon which many affidavits were read, as were also depositions of the parties.

³⁹⁰ In addition to the showing as to her lack of means and the facilities of the defendant, the plaintiff states that she will require thirty or forty witnesses, many of them to prove that the parties have cohabited together as husband and wife, and are generally reputed to be such, and that the defendant has frequently so represented. In her deposition she states that the contract consisted simply in this, that the defendant said to her, "You are my wife." That no witnesses were present, and that she had refused longer to live with defendant unless he married her.

These facts are specifically denied by the defendant. He admits the cohabitation, and that he has supported the plaintiff, but he avers that she is an Indian woman who had, prior to his relations with her, been kept by many other men, by one of whom, Gibbs, she had a son, Thomas H. Gibbs, who makes an affidavit on her behalf in this case. Defendant also states that since she commenced living with him she has several times left him, living with other men, and that she sometimes went with the Indians to their fandangoes, and returned when she chose. He denies that either ever supposed the relations to be matrimonial, or that he ever called her wife, or represented her to be such. He says that he never even spoke to her upon the subject, but he admits that he supported her and her son.

Thomas H. Gibbs, the illegitimate son of the plaintiff, corroborates the statements of his mother, and says that he "was always told and led to believe by said John R. Hite that plaintiff was the wife of said John R. Hite."

Plaintiff also read the affidavit of one James D. Westfall, who deposed that on one occasion defendant introduced plaintiff as his wife, and also that the parties were generally reputed to be husband and wife. This constitutes the evidence of plaintiff upon the issue of marriage.

The defendant, in addition to his specific denial, read the depositions of ten other persons, all of whom depose that they were intimate acquaintances of both parties and well acquainted

in the neighborhood where they lived. They unite in saying that neither party ever claimed to be married to the other, and they were not, at any time, reputed to be husband and wife. Some of them corroborate other statements made by defendant ³⁹¹ as to illicit relations of plaintiff with others. In addition, the reputation of Gibbs, plaintiff's son and main witness, was attacked.

Appellant contends that the showing was insufficient to justify the action of the court in granting alimony. The testimony of plaintiff in regard to the contract of marriage was in itself quite unsatisfactory, especially when taken in connection with the charge in defendant's affidavits, which she does not deny, that she had, before her cohabitation with defendant, and even since, had improper relations with other men. Under such circumstances it is difficult to believe that an Indian woman would object to further relations except upon condition of marriage. The positive denial of the defendant is certainly sufficient to overcome this testimony under such circumstances. The matter must then depend upon the evidence of common repute, and no one would contend that the plaintiff did show a common, uniform, and undivided repute of marriage.

But I think it evident that the court did not determine the question of marriage at the hearing. The judge doubtless adopted the views of plaintiff's counsel upon the subject and concluded that it was only necessary to hold that plaintiff had by her affidavits made out such a case as would throw the burden of proof upon the husband.

To justify alimony, marriage must be admitted or proven. Upon this subject there is no difference in the authorities. Plaintiff's counsel contends that it is proven, within the meaning of this rule, when the wife upon her showing makes a prima facie case, regardless of the denials or proof produced by the husband. He says it is a novel proposition that on the hearing for temporary alimony plaintiff must produce a preponderance of evidence. He claims this would be equivalent to saying: "Prove your case by a preponderance of evidence, and then you shall have an allowance to enable you to make such proof." He also says: "In this case the plaintiff made a prima facie case, and if the defendant had produced a hundred witnesses in an attempt to overcome her affidavits the result would be the same. Indeed, it would be only stronger reason for allowing her means sufficient to procure the evidence which she and her counsel,

³⁹² who had talked with the witnesses, say she can produce, if given the means to do so."

And this, I think, is really the question in the case: Was it sufficient to entitle the plaintiff to alimony and suit money for her to make by her own showing a *prima facie* case? I believe there is no authority for that position. If the marriage were admitted, then, upon a showing of the wife's necessities and the faculties of the husband the allowance is almost a matter of course. It is otherwise when the marriage is denied. Then, before alimony can be allowed, the marriage must be proved, and a *prima facie* showing made by the wife when there is a counter showing is not sufficient. The judge should be satisfied from the entire proof made of the fact of marriage. Unless upon that question the husband has had his day in court and a hearing, if alimony is allowed, his property is taken without due process of law.

This precise question has not been considered, or even suggested, in any case to which my attention has been called, except in *McKenna v. McKenna*, 70 Ill. App. 340. It was there said that in such case—when the marriage is denied—the order cannot properly be made "until a hearing has been had and the court upon it finds that the relation of wife and husband exists."

The hardships which might result from either doctrine is there very tersely stated. The learned judge quotes from *Schonwald v. Schonwald*, 1 Phill. Eq. 219, to the effect that it is better when a woman makes oath of the fact of marriage to make an allowance, although the oath may turn out to be false, than that a wife may be in danger of starvation "if a brutal husband makes oath denying the marriage, which may turn out to be false." To which the Illinois judge replies that "the more accurate statement would be that it is better to compel any man to pay temporary alimony and expenses of suit to any woman who may see fit to make oath that he is her husband, however strongly he may deny the allegation, rather than to allow her to be in want of money which he has."

Whatever hardships may result, the court cannot lawfully take by final decree money from A and give it to B, whatever may be the necessities of B, when A disputes the facts upon ³⁹³ which his liability is made to depend, without a trial and a determination of the issues made. The hardship to B cannot modify the imperative rule of law and the absolute constitutional guaranty. It is not such a trial, and there can be no such finding, when a man is merely called into court to see

whether one claiming to be his wife has in her pleadings and affidavits made a prima facie case. He must be heard and be allowed to submit evidence which must be considered in determining as to the fact of marriage.

But that opportunity need not be on the trial of the case itself. The application for alimony, though it cannot be considered a separate suit, is a proceeding for a separate judgment, which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it. It is a final judgment from which an appeal may be taken: *Sharon v. Sharon*, 75 Cal. 1.

To satisfy the requirement of due process of law it is not always necessary that such a trial should be afforded as is had in ordinary suits in courts of justice. The hearing allowed must be such as is practicable and reasonable in the particular case: *Cooley's Constitutional Limitations*, 434. See, also, *Ex parte Ah Fook*, 49 Cal. 406; *Lent v. Tillson*, 72 Cal. 404. *Cooley* says the opportunity to be heard must be such as "the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."

It has been the practice to determine as to the allowance of temporary alimony upon motion with notice and upon affidavits. The defendant is thereby afforded an opportunity to be heard.

Many cases are recited by respondent's counsel which he contends hold that all that is required on the part of the wife to justify an allowance of alimony is that she, by her showing, shall make such a case as upon a trial of the issue would cast the burden upon the husband. It is not necessary to review all the cases, but the case of *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, is much relied upon, and concerning it a few remarks may be made. That case has some likeness to this. A contract marriage was alleged, with subsequent cohabitation. ³⁹⁴ The wife alleged that defendant on many specified occasions introduced her as his wife, that they were received as husband and wife by reputable acquaintances, and such was their common reputation. The husband denied the marriage, and that he had by word or act at any time or place given the least foundation for the supposition or charge that plaintiff was his wife. He denied that their cohabitation was matrimonial, but averred that plaintiff was of unchaste character and person, and her relation with defendant was libidinous and unsanctioned by

law. In other words, he admitted the cohabitation, claimed that it was meretricious from the beginning. Judge Folger did not say that this was not a denial of a fact essential to constitute marriage, but the contrary. Cohabitation and holding out to the world that the persons so cohabiting are married and general reputation, though all admitted, do not of themselves constitute marriage. But they authorize the presumption of the other fact, to wit, that the cohabitation was with matrimonial intent. This last fact was denied by Brinkley. The court did consider the affidavits of defendant, but concluded that they did not overcome the case made by the plaintiff. The judge did say that the question was not whether the evidence would be sufficient to justify a final decree, but whether "the proofs of the parties give reason to apprehend that upon a trial of the issues between them there is the fair probability that the plaintiff will maintain her allegations." That is, does the evidence submitted by both show that probably plaintiff will prevail? I do not understand how this could be unless there was upon that hearing a preponderance of evidence in favor of marriage, although, inasmuch as the trial was not as complete nor the evidence of as high a grade as upon the trial of the issues in the case, it would not justify a final decree or a finding which would be an estoppel.

Judge Folger evidently thought that when Brinkley admitted that they had cohabited as husband and wife in the face of the world, and had associated with intimate acquaintances who were reputable people, as though the relation was honorable, that it raised a presumption of marriage not overcome by the general denials of the defendant and his claim that the relation was meretricious. Innocence and morality are to be presumed ³⁹⁵ rather than the opposite. This is very strongly put by Judge Folger. He says the defendant admits facts and circumstances presumptive of marriage, but says of them "that though apparently proper and rightful, they were but the cover for a meretricious and libidinous connection, begun and continued in impurity," and that the issue was whether the cohabitation was honorable and matrimonial, or "the unsanctioned foregathering of a lecher and a wanton."

This view was taken of that case in *Collins v. Collins*, 71 N. Y. 269. There the wife made, beyond doubt, a *prima facie* case, but the husband averred that the *de facto* marriage, which he admitted, was void, and the court held that it was error to allow temporary alimony until that question was settled.

The principal difference between this case now in hand and the Brinkley case is, that this defendant denies that he ever represented the plaintiff to be his wife, or that they were reputed to be such. In the Brinkley case these facts were admitted.

We are not called upon here to say that it is necessary, in order to justify the allowance of temporary alimony, that a marriage de jure must be shown. The rule upon this subject is discussed by Mr. Bishop in his work on Marriage, Divorce, and Separation, section 922 et seq. All the evidence here tending to show marriage at all tends to prove a marriage de jure; and such was also the fact in the Brinkley case, although counsel seem to have understood that case differently.

I think the superior court did not intend to hold upon all the evidence before it—that of defendant as well as that submitted by plaintiff—that there was a preponderance in favor of the fact of marriage; and, if it must be held that it did so adjudge, there was a plain abuse of discretion.

Judgment and order reversed.

Van Dyke, J., and Henshaw, J., concurred.

McFARLAND, J., dissented. He thought that, for the reasons given in the opinion in department, the order appealed from was there properly affirmed, and should be adhered to. "It seems to be admitted," he said, "that in a divorce suit, although the marriage be denied, still an allowance for alimony to the wife may be rightfully made before the determination of the issue of marriage at the final hearing of the case. But that would be of little advantage to the plaintiff, if, at the preliminary hearing, 'the marriage must be proved, in the sense in which that proposition is meant in the opinion of the majority of the court. In the case at bar, the issue of marriage or no marriage is the main issue in the case, and, according to the majority opinion, she cannot be allowed any aid for the purpose of procuring evidence on that issue, unless, without such aid, she had already proved it; although she may have no means at all, she must still rely entirely upon herself of obtaining evidence and procuring counsel in support of her side of that issue. Whether or not she has made sufficient proof at the preliminary hearing to warrant the court in allowing her aid in preparing herself for the final adjudication of that issue, is a question, in the first instance, for the exercise of the discretion of the trial court; and, in passing upon the conclusion of the trial court upon that point this court is estopped, in my opinion, from disturbing that conclusion, if there be a fair and material conflict of evidence upon the issue. In the case at bar, there is no doubt that the respondent produced evidence tending strongly to establish the fact that there was a marriage. It is true that ap-

pellant also produced evidence on the other side of that issue, but I do not think that, under the well-established rule touching conflicting evidence, we are warranted in disturbing the conclusion of the court below. Respondent was clearly entitled, in my opinion, upon the showing made by her, to have aid from the appellant in procuring evidence to be used upon the final determination of that issue.

"Appellant seems greatly impressed with the danger of some well-to-do husband being compelled to contribute to the prosecution of a suit brought by some woman who falsely swears she is his wife; but no fear seems to be entertained that a husband may prevent an injured wife from obtaining means to prosecute a just suit by simply averring that he is not her legal husband.

"Appellant seeks to emphasize the fact that the plaintiff is an Indian, but it is entirely immaterial what race she belongs to. Appellant selected and enjoyed her as his chosen companion through the youth and prime of her womanhood. When he discarded her it was evidently not because she was an Indian, but because she was then an old Indian."

GAROUTTE, J., also dissented. "It is held," he said, "in the majority opinion in this case, that when alimony and suit money, pendente lite, is prayed for in an action for divorce, the marriage being denied, then, upon the preliminary hearing, the fact of marriage must be established by a preponderance of evidence, or the application should be denied. Upon the final hearing it is only necessary to establish the marriage by a preponderance of evidence. Hence, if the conclusion of the court be sound, the result is that, in every case where the marriage becomes an issue of fact, there can be no such thing as alimony and suit money. For, if the woman is able to establish the marriage by a preponderance of evidence without the money to assist her, she has no need of the money, and her application should be denied for that reason. If she can establish the fact of marriage, upon the preliminary hearing, by a preponderance of evidence, without money, she can as readily establish that fact upon the final hearing without money. If she be able to establish the fact of marriage by a preponderance of evidence without money, then she need not go to the trouble of establishing that fact until the final hearing. It is thus made plain that the entire reason of the rule, the principle upon which the rule rests, is all gone when it is held that the fact of marriage, upon the preliminary hearing, must be established by a preponderance of evidence. It may be admitted that the conclusion declared by Justice Temple is supported by persuasive reasons; yet we find no court in this country sustaining the proposition, unless the decision in McKenna v. McKenna, 70 Ill. App. 340, is that case."

The learned justice then cited, quoted from, and commented upon Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460, Collins v. Collins, 71 N. Y. 269, 274, Vincent v. Vincent, 16 N. Y. Com. Pleas, 534, and Sharon v. Sharon, 75 Cal. 1, 45, to show that the rule of law declared by the majority opinion as to the quantum of evidence necessary to be produced by the wife at the preliminary hearing

to support the fact of marriage is opposed to the great weight of authority. "Yet I am free to say," he said, "the true solution of the question presents difficulties of no small proportions—difficulties that I am not willing to meet unless necessity demands it, and here I find no such necessity; for, even conceding the rule of law to be as stated by the learned writer of the majority opinion, namely, the marriage must be established by a preponderance of evidence, then, under such rule, this order should be affirmed.

"The reasons for the affirmance of this order are these: Upon the trial of any issue of fact, in a civil action, it is not for this court to say, upon appeal, that the evidence preponderates in favor of the plaintiff, or that the evidence preponderates in favor of the defendant. This court has nothing to do with the preponderance of evidence. It has so decided times innumerable. It is even a rule universally invoked by this court against the defendant in criminal cases. Under all authority in this state, it is for the trial court to say which way the evidence preponderates. And, when that court has so declared, the matter of preponderance of evidence is forever foreclosed from investigation by this court. Treating this proceeding for alimony and suit money with all the dignity of a civil action, conceding that it is to be tried and decided exactly by the same rules of law as any civil action, then the only question here is, Does this record present a substantial conflict in the evidence as to the fact of marriage? And this question is not to be determined by the great number of witnesses upon the one side and the limited number upon the other, for it is often the case that the weaker side in number and in money is the stronger in right. Hence, the fact that the plaintiff is an Indian woman, and her son an illegitimate son, furnishes no reason why this court may cast aside their evidence. Either as matter of law or matter of fact, it cannot be said that an Indian woman, or an illegitimate son, is not to be believed under oath.

"Let us pause a moment to look at the evidence. A great portion of it is without substantial conflict, as follows: Hite lived with this woman for twenty-five years. During that time he furnished her with all the necessities of life. He gave her a house in which to live. He was the father of her child. His sister visited her at this house and slept with her. His nephews visited her at this house, ate at her table, and addressed her as 'Aunt Lucy.' He sent her illegitimate son to school, and paid the expenses of his schooling. He treated this son as his own son, and he was always considered and reputed in the neighborhood to be the stepson of defendant Hite. In addition to this uncontradicted evidence we have the testimony of Thomas Gibbs, the illegitimate son, to the effect that the plaintiff is known far and near throughout the southern part of California as the wife of John R. Hite; that defendant has introduced plaintiff as his wife, and held her out to the world as his wife continuously; that defendant's relatives and friends have associated freely with plaintiff and visited plaintiff as the wife of defendant. We also have the testimony of one Westfall, to the effect that plaintiff and defendant were known in that neighborhood and

adjoining counties as husband and wife; that the plaintiff was everywhere called 'Mrs. Hite,' and 'Lucy Hite, wife of John R. Hite,' and that plaintiff and defendant held themselves out to the world and were always treated as husband and wife. From this condensed statement of the showing made by the plaintiff, I feel entirely satisfied in saying that she is entitled to alimony and suit money, in order that she may be able to meet the defendant squarely at the trial of the case upon the issue of marriage or no marriage.

"I utterly fail to comprehend how it may be said from the record that the trial judge decided this case upon a wrong theory. There is not a word in the record to indicate it. Upon the contrary, the fact that the hearing was had after notice to the other side, and that, upon such hearing, defendant introduced a great mass of evidence to support his claim of no marriage, indicates convincingly to my mind that the trial judge heard and decided the case upon the right theory, and that his conclusion was based upon all the evidence placed before him by both parties to the litigation. I think the order should be affirmed."

MARRIAGE AND DIVORCE—ALIMONY—COUNSEL FEES—NECESSITY OF MARRIAGE.—No alimony will be granted, either permanent or temporary, unless the parties were validly married: See monographic note to *Methvin v. Methvin*, 60 Am. Dec. 669, on alimony, and its allowance. It cannot be granted where there is no marriage: *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372. Alimony and counsel fees cannot be decreed except in a case specified in the statutes: *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389.

MARRIAGE AND DIVORCE—ALIMONY AND SUIT MONEY WHERE MARRIAGE IS DENIED.—If the answer in an action for a divorce by an alleged wife denies the marriage, temporary alimony and expense money will not be allowed until the plaintiff makes out a reasonably plain case as to the existence of the marriage. Its averment and denial in the pleadings do not bind the court, and, if a fair presumption of fact is raised by the proofs presented, the court has power to make the allowance. It is not necessary that it be established so conclusively as would be required for the ultimate purposes of the action: *Bardin v. Bardin*, 4 S. Dak. 305, 46 Am. St. Rep. 791, and note.

DE GROOT v. PETERS.

[124 CALIFORNIA, 406.]

INJUNCTION AGAINST ANNOYING CONDUCT OF DISCHARGED EMPLOYEE, WHO ASSUMES TO ACT AS PARTNER—INSOLVENCY.—A person who is merely employed as a salesman in a business, upon a salary, with a right to a share of the net profits, if any, but who is discharged for neglect of duty, and who, claiming to be a partner of his employer, with a partner's rights, afterward persists in annoying conduct, such as intruding upon the business premises, interfering with the owner's affairs, assuming control over the business, and intercepting money due to the owner,

may be enjoined from continuing such conduct, especially where he is admittedly insolvent, as there is no adequate remedy at law.

REAL PROPERTY—DISCHARGED EMPLOYÉ'S RIGHT OF FREE ACCESS TO STORE IN WHICH HE CLAIMS A SHARE OF PROFITS.—A person who is merely employed as a salesman in a store, upon a salary, and who is discharged for neglect of duty, is not entitled, by virtue of his right to a share of the net profits, if any, to be allowed free access to the premises, in order to protect his interest therein, if the existence of such profits is denied, and it is not shown that, if there are such profits, his presence in the store is necessary for the protection of his share thereof.

Fuller & Burnett, for the appellant.

J. Noonan Phillips and Goodrich & McCutchen, for the respondent.

406 BRITT, C. Plaintiff alleged in his complaint in this action that himself and defendant are partners under the name of the Buffalo Woolen Company, constituted such by an agreement in **407** writing, engaged, it seems, in the business of merchant tailors; and upon information and belief he charged that defendant committed divers specified acts of misconduct in the course of said business; wherefore he prayed a dissolution and an accounting. Defendant answered, denying any partnership with plaintiff, and exhibiting a contract in writing between them, by the terms whereof (as the court below seems to have interpreted it, and we think correctly) the plaintiff was employed by defendant as a salesman upon a salary in said business, with a right to one-fourth of the net profits, if any, but was not made a partner with defendant. At the time of filing such answer defendant filed also a sworn cross-complaint, in which he averred, among other things, that the written contract exhibited in his answer is the same agreement mentioned in plaintiff's complaint; that plaintiff was in his employ as a salesman, and that after the commencement of this action plaintiff neglected his duties in that capacity and harassed defendant in the conduct of his business, and that defendant discharged him; that nevertheless plaintiff holds himself out to the public as a partner in said business and intrudes into defendant's office and place of business and there remains, interfering with defendant's affairs; that he has collected money from the patrons of defendant, due to the latter, and converted it to his own use; that he claims the right to do these things as a partner in the business, and threatens and intends to continue such acts, contrary to the will of defendant; and that plaintiff is insolvent. Defendant prayed an injunction to restrain the continuance of

said conduct of plaintiff, and the court granted the writ. Afterward plaintiff answered the cross-complaint, denying some of its averments, and reasserting his status as a partner; but he did not deny that his alleged contract of partnership is contained in the instrument described in the pleadings of defendant, or that he attempts to participate in the management of the business, or that he is insolvent. He moved for a dissolution of the injunction; the motion was heard on the pleadings and was denied; hence this appeal.

The main insistence of plaintiff is that, conceding himself to have no interest as a partner, yet the case made shows that at most he is a mere trespasser in defendant's store, and that ⁴⁰⁸ injunction does not lie to restrain him; citing *Mechanics' Foundry v. Ryall*, 75 Cal. 601. This case is clearly distinguishable from that; upon the defendant's showing (which for the purposes of this appeal must be said to be quite imperfectly repelled by plaintiff's answer to the cross-complaint) it appears that plaintiff is not only a trespasser upon the premises of defendant, but assumes a control over his business, intercepts moneys due to him, and holds himself out to the public as a partner having the right to do these things. Bodily ejection of plaintiff from the premises would not necessarily prevent the continuance of such injuries; nor would an action for damages afford adequate relief, for the reasons, among others, that it would be extremely difficult to ascertain in pecuniary terms the amount of damage, and that plaintiff is admittedly insolvent. No authority in point is brought to our notice, but the following illustrate in some measure the principles which should govern here: *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74; *Routh v. Webster*, 10 Beav. 561; *Brass etc. Works Co. v. Payne*, 50 Ohio St. 115; *Bates on Partnership*, secs. 772, 990; *Parsons on Partnerships*, 4th ed., sec. 216.

Plaintiff also contends that in any event he should have been allowed free access to the store in order to protect his interest in the net profits of the business. On that point it is sufficient to say that the defendant averred positively in his pleadings that the business never yielded any net profit, and offered to submit his books and all his transactions to scrutiny in support of his assertion; and the plaintiff showed no reason why, if there were such profits, his presence in the store is necessary for the protection of his share thereof.

The order appealed from should be affirmed.

Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

INJUNCTION—INSOLVENCY.—REPEATED TRESPASSES, PETTY ANNOYANCES, et cetera, may sometimes, when accompanied by other acts or facts, be made the basis for a permanent injunction: *Kern v. Field*, 68 Minn. 317, 64 Am. St. Rep. 479. The insolvency of a trespasser is an important element in determining whether or not an injunction should be granted: *Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101, and note. An injunction may issue to restrain a trespass where the defendant is insolvent, and the injury to the complainant's property would be otherwise irreparable: *Notes to Lewis v. North Kensington*, 27 Am. St. Rep. 727; *Carney v. Hadley*, 37 Am. St. Rep. 109.

MERCHANTS' AD-SIGN COMPANY v. STERLING.

[124 CALIFORNIA, 429.]

CONTRACT IN RESTRAINT OF TRADE—WHEN VOID—BUSINESS OF BILL POSTING.—Under a statute providing that every contract by which any person is restrained from exercising a lawful business of any kind is to that extent void, a contract not to engage in the business of bill posting, which is a lawful business, is an agreement in restraint of trade, and is therefore void.

GOODWILL OF CORPORATION—TRANSFER OF, BY STOCKHOLDER.—A stockholder of a corporation cannot transfer its goodwill, even if goodwill, as property, pertains to a corporation.

CONTRACT IN RESTRAINT OF TRADE—WHEN VOID—BUSINESS OF BILL POSTING—GOODWILL.—An agreement by a vendor of stock in a corporation engaged in the business of bill posting, and other methods of advertising, to abstain from carrying on a similar business, in the same city, so long as the vendee, or his successor in interest, shall carry on a like business therein, is declared by the statute of California to be void, as in restraint of trade, and is, therefore, not enforceable. The element of goodwill is not present in such a transaction.

GOODWILL OF CORPORATION—SALE OF, BY STOCKHOLDER—ESTOPPEL.—Although a stockholder in a corporation pretends to dispose of the goodwill of the corporate business, with a sale of his stock, yet the vendee must be presumed to know that he has no vendible interest in such goodwill. The vendor, therefore, is not estopped from denying the existence of such interest.

PLEADING—ILLEGALITY OF CONTRACT IS AVAILABLE ON DEMURRER—WHEN—INJUNCTION.—If it appears from the face of the complaint that a contract is void as being in restraint of trade, the complaint is demurrable for insufficiency of facts. The maxim, *Ex turpi causa non oritur actio*, applies in such a case, where an injunction is sought to restrain the defendant from engaging in business contrary to the terms of a void contract.

Fuller & Burnett, for the appellant.

Davis & Rush, for the respondent.

430 CHIPMAN, C. Injunction to restrain defendant from engaging in the business of advertising. It is alleged that plaintiff is a corporation engaged in the business of bill posting and other methods of advertising in the city and county of Los Angeles; that about August 20, 1896, defendant owned eighty shares of the capital stock of plaintiff company, and was actively engaged in the management of plaintiff's said business; about September 15, 1896, he transferred without consideration sixty of said eighty shares to his wife in trust for himself and his sole use and benefit, and for the purpose of concealing the true ownership of said sixty shares; on August 12, 1897, he sold, by written contract, for a good and valuable consideration, to one Wilshire "all his interest, direct and indirect, in the plaintiff, and his interest in the goodwill of the business of plaintiff, and said defendant in said contract, for a good and valuable consideration to him in hand paid by said Wilshire, agreed to and with said Wilshire that he would not conduct, nor assist in the conduct of, bill posting in said city of Los Angeles so long as said Wilshire, or any person deriving title to said goodwill from him, should carry on a like business therein"; on January 20, 1898, Wilshire transferred the contract of August 12th to plaintiff. The complaint then alleges the formation of the Los Angeles Bill Posting Company, a corporation, about January 17, 1898, in said city and county, its business in part being similar to that of plaintiff's, and that since said date it **431** has been so engaged; that defendant, in violation of his said agreement, helped to form the Los Angeles Bill Posting Company, and became a stockholder therein, and conducted, and assisted to conduct, its business, and is its principal manager, and said company has thereby been enabled to enter, and has so entered, into successful competition with plaintiff in the bill posting business in said city, and that without the services of defendant said company could not have been able successfully to compete with plaintiff in its said business. Plaintiff seeks damages and to restrain defendant from conducting or assisting in conducting the business of the Los Angeles Bill Posting Company. A demurrer to the complaint for insufficiency of facts and for ambiguity and uncertainty was sustained, and the court gave judgment for defendant without leave to amend, from which this appeal is prosecuted. Respondent has filed no brief.

The principal question presented by appellant is as to the validity of the contract between defendant and Wilshire. The allegation of the complaint is that defendant sold his interest

in the goodwill of the business of plaintiff corporation, in consideration of which he agreed not to conduct or assist in conducting the business of bill posting in which plaintiff was engaged.

There is no allegation that defendant had any interest in such goodwill, unless from the ownership of certain shares of the corporation it may be so inferred.

Section 1673 of the Civil Code reads as follows: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Section 1674 of the Civil Code provides as follows: "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein." Section 992 of the Civil Code defines the goodwill of a business to be "the expectation of continued public patronage," and "is property transferable like any other property": Civ. Code, sec. 993. "One who sells the goodwill of a ⁴³² business thereby warrants that he will not endeavor to draw off any of the customers": Civ. Code, sec. 1776. "A partner, as such, has not authority to do any of the following acts, unless the copartners have wholly abandoned the business to him, or are incapable of acting; . . . 2. To dispose of the goodwill of the business": Civ. Code, sec. 2430. But "partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof": Code Civ. Proc., sec. 1675. These constitute all the statutory provisions upon the subject of goodwill and restraint of trade which bear upon the question.

It is conceded by appellant, what is obviously true, that a stockholder cannot transfer the goodwill of the corporation. In the case of *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 118, it was said: "It is contended that goodwill enters into and forms an element in the value of the shares of stock. No case has been produced to us, nor have we been able to find any, holding or even intimating that this is so. We find no such element of value in the least hinted at by anyone who has written on the subject, nor has any such been called to our attention. We cannot recognize any such element as giving value to shares in a trading corporation. It would be strange to

predicate goodwill as pertaining to or extending to an abstraction, to an 'artificial being, invisible, intangible, and existing only in contemplation of law.' " Apparently conceding the correctness of these views, counsel for appellant insist that "where a stockholder has been actively engaged in the management of the business of the corporation he surely has the privilege of increasing the vendibility of his stock by being able to agree with the buyer that he will refrain from carrying on a similar business to that heretofore engaged in by himself and the corporation which he managed, of course within the time and territorial limits allowed by the code." We are cited to the following well-considered and instructive cases as showing that the statute should be given a liberal construction: *Brown v. Kling*, 101 Cal. 295; *City Carpet Works v. Jones*, 102 Cal. 506; *Meyers v. Merillion*, 118 Cal. 352. In the case now before ⁴³³ us, there seems to be no room for construction. Defendant, as a stockholder, did not and could not transfer the goodwill of the corporation, assuming, what we do not consider it necessary to decide, that goodwill, as property, pertains to a corporation. The element of goodwill, therefore, is not present in the transaction. The statute says that "one who sells the goodwill of a business may agree," et cetera; but the statute also says that "every contract by which one is restrained from exercising a lawful . . . business of any kind, otherwise than is provided by the next two sections [in which the above provision is stated], is to that extent void."

Reading the sections 1673 and 1674 together, they may be briefly paraphrased as follows: Every contract by which anyone is restrained from exercising a lawful business is to that extent void, except where he has sold the goodwill of a business, in which case, as to that or similar business, he may agree not to engage therein so long as the buyer carries on a like business within specified limits. It is not a question whether the holder of shares of a corporation should be permitted to enhance their vendibility by agreeing to abstain from carrying on business similar to that of the corporation, within the limitations prescribed; but it is a question whether such an agreement is not by law declared to be void. We are pointed to *City Carpet Works v. Jones*, 102 Cal. 506, where it is said that "the code introduces no new principles; it simply eliminates from the controversy arising upon such restrictions the question as to what is a reasonable territorial limit." And so we are told that the code commissioner's note shows that this one question of terri-

torial restriction is the only departure from common-law principles sought to be effected by the code provisions. We think the code provision was intended to and in fact went further than is here suggested. In *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, the rule at common law, even as finally relaxed and applied, was said to be "uncertain, and led to much perplexing legislation; and the law upon the subject in this state is now declared in section 1673 of the Civil Code." Referring to the next two sections, it was said that they merely provide that "one who sells the goodwill of a business may agree not to carry on a similar business ⁴³⁴ within a specified county or city; and that in anticipation of a dissolution of a partnership, a partner may agree not to carry on a similar business within the city or county where the partnership business is transacted." These latter sections were held not to apply because the case did not fall within either one of the exceptions—i. e., being the sale of a business and its goodwill or a dissolution of a partnership. The case was determined wholly under section 1673. The contract there involved was held to be void as in restraint of trade. The cases cited by appellant from our reports and other cases not cited where these sections have been referred to, are cases where the business and goodwill were sold, and the liberal construction given the sections was in aid of agreements coming within the exceptions of and permitted to be made by the code.

. It seems to me that the only question here is, as it was in the *Vulcan Powder Company* case, Was the contract in restraint of trade?

The language of the code is unmistakable: "Every contract by which one [i. e., any person] is restrained from exercising a lawful business of any kind is to that extent void." The allegation is, that defendant agreed not to engage in the business of bill posting, which is a lawful business. This was an agreement in restraint of trade, and therefore void.

2. But it is said that defendant, having represented by his conduct that he had such an interest in the business and goodwill of plaintiff as would support the restraining covenant, and having accepted a valuable consideration therefor, he is now estopped from denying the existence of such interest: Citing *Potter v. Ahrens*, 110 Cal. 674. In the case cited, the contract purported to dispose of the business and goodwill of manufacturing and vending certain articles of merchandise. No question arose as to the right of the parties to dispose of the good-

will. Being clothed with ownership and power to sell, the defendants were clearly estopped to deny their interest in what they purported to sell. In the case here, however, it is conceded that defendant could not dispose of the goodwill of the corporation. Defendant had no vendible interest in that goodwill within his disposition, and this the plaintiff must be presumed to have known, and defendant is, therefore, not estopped. ⁴³⁵ The contract being void as in restraint of trade, and it so appearing from the face of the complaint, the defense is available on demurrer. The maxim *Ex turpi causa non oritur actio* applies.

It is advised that the judgment should be affirmed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

ILLEGAL CONTRACTS ARE NOT ENFORCEABLE: *Webb v. Fulchre*, 3 Ired. 485, 40 Am. Dec. 419; and a contract is illegal when it is opposed to the common or statutory law: *Ohio etc. Trust Co. v. Merchants' etc. Trust Co.*, 11 Humph. 1, 53 Am. Dec. 742; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717.

ESTOPPEL IN PAIS.—AN ACT done where the means of knowledge are equally open to both parties does not create an estoppel in pais: *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307.

PLEADING—DEMURRER—INSUFFICIENCY OF FACTS.—The adverse party may demur, under the code system, if every fact essential to the claim or defense is not stated: *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

COFFEE v. HAYNES.

[124 CALIFORNIA, 561.]

EXECUTION—SUPPLEMENTARY PROCEEDINGS—AFFIDAVIT FOR EXAMINATION OF GARNISHEE—SUFFICIENCY OF.—An affidavit for an order for the examination of a garnishee, containing a statement, substantially in the language of the statute, that he "has property of said judgment debtor," is sufficient to show that the garnishee has such property. Such statement is not a mere conclusion of law.

EXECUTION—SUPPLEMENTARY PROCEEDINGS—INSUFFICIENCY OF AFFIDAVIT FOR EXAMINATION OF GARNISHEE—WAIVER OF.—A garnishee, who appears and answers, and proceeds to a hearing, upon a citation issued on an affidavit for an order for the examination of himself, as garnishee, thereby waives any objection to the insufficiency of the affidavit.

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONSTITUTIONALITY OF STATUTES AUTHORIZING.—Statutes

which provide for proceedings supplementary to execution against persons having property of the judgment debtor are not unconstitutional on the ground that no provision is made for notice to the judgment debtor and no opportunity given him to be heard.

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CIVIL DEATH—SUBJECTION OF CONVICT'S PROPERTY TO PAYMENT OF DEBTS.—Civil death is not identical with physical death, and a life sentence of a convict does not, under the statutes of California, interfere with the disposition of his property, or the taking of it to pay his debts. Hence, a court has jurisdiction to enforce an execution against the property of a defendant in an action, who has been sentenced to the state prison for life, on a charge of murder, though the judgment, in the civil action, was not entered against him until after his civil death.

EXECUTION—SUPPLEMENTARY PROCEEDINGS—GARNISHMENT OF PROPERTY NOT IN CUSTODY OF LAW.—Money obtained by a chief of police of a person arrested for murder, not at the time of his arrest, or from his person, but after the arrest, from the cabin of the prisoner, who told the chief where to find the money, is not property in custodia legis, although in the custody of an officer of the law, where it had no connection whatever with the cause of the arrest, and was not necessary for any purpose as evidence. The chief, in such a case, is neither more nor less than the bailee of the prisoner, and such money may, therefore, be reached by garnishment.

Appeal from an order requiring the chief of police of the city and county of San Francisco, as garnishee, to pay moneys under an execution.

J. J. Dunne, assistant district attorney, for the appellant.

George D. Collins, for the respondent.

563 **CHIPMAN, C.** Action for the value of certain legal services as attorney-at-law rendered defendant Haynes by plaintiff's assignors. Plaintiff recovered default judgment for nineteen hundred and twenty dollars on June 21, 1898, and on the same day a writ of execution was duly issued in the action and was served upon appellant Lees June 22d, as garnishee. Appellant answered as follows: "San Francisco, June 22, 1898. (Directed to the sheriff.) Dear Sir: Replying to your process of garnishment . . . I have in my possession no moneys . . . belonging to Theodore P. Haynes, . . . except such as has come into my possession in my official capacity . . . by reason of said . . . (defendant) having been a prisoner in my custody, and any and all of which property is exempt from attachment or execution by reason of its having come into my custody in the manner aforesaid. Yours respectfully, I. W. Lees, Chief of Police." Thereafter, and on the same day, plaintiff filed his affidavit in the court praying an order of the court

directed to the said Lees to show cause why he should not obey the writ of execution. On June 27th the judge issued an order requiring the said Lees to show cause, to which the latter made written return under oath July 1, 1898. The matter was heard upon the papers and upon the proofs submitted at the hearing, and the court ordered the said Lees to pay over to the sheriff the sum of nine hundred and forty-seven dollars and forty-five cents. The appeal is from this order and is here upon bill of exceptions.

On March 23, 1898, Lieutenant Burke, of the police department of San Francisco, was shot and killed by defendant, who was promptly arrested and brought to the police station, where he continually proclaimed that the men who had visited him on the occasion of the lieutenant's death were robbers and thieves, ⁵⁶⁴ and that the lieutenant was not an officer, but was a robber and had come there to rob him. It was suggested to defendant that these persons would not have robbed him of much if they had robbed him, whereupon he disclosed the fact that he had money hid away and buried. To determine whether this was a mere delusion appellant went to defendant's cabin, taking defendant with him. A search was made under defendant's direction, and under the cabin floor a considerable sum of money was unearthed and some jewelry contained in tin cans. Appellant believed, from the persistent claim of defendant that he was about to be robbed, and from his conduct in the matter, that some question was raised as to defendant's sanity, and that whether the existence of this money was or was not a mere delusion was a material fact bearing upon defendant's sanity. It seems that defendant stated with great accuracy just what he had buried away in each tin can, and it was thought by appellant that to that extent this knowledge showed that he was sane; and it was claimed by appellant that the money so seized was necessary evidence to be used at the trial, and hence could not be taken by attachment. It is not disputed that the money belonged to defendant. His examination took place on April 11, 1898, and his trial began on June 8th following; he was convicted on June 13th and was sentenced to imprisonment for life.

1. It is claimed that the affidavit of plaintiff for the order of examination is fatally defective, because it fails to state facts showing that the garnishee has property of the judgment debtor; that the statement in the affidavit that such garnishee "has property of said judgment debtor," et cetera, is a mere conclu-

sion of law, and hence the affidavit is a nullity and the order void.

The point was not raised at the hearing in the superior court. Appellant appeared and answered, and proceeded to the hearing upon the citation issued upon this affidavit, and appellant must be held to have waived any objection to its sufficiency. Furthermore, we think the affidavit was a substantial compliance with section 717 of the Code of Civil Procedure.

2. It is further claimed that sections 717 and 719 of the Code of Civil Procedure are unconstitutional for the reason that no provision is made for notice to the judgment debtor and no opportunity ⁵⁸⁵ given him to be heard. The question has been otherwise decided by this court: *High v. Bank of Commerce*, 95 Cal. 386, 29 Am. St. Rep. 121.

3. It is claimed that defendant was civilly dead when the order was made, and the court was without jurisdiction to make the order: Citing Pen. Code, secs. 673-675. By section 673 "a sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced." By section 674 "a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead." By section 675 it is provided: "That the provisions of the last two preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property." Section 677 provides: "No conviction of any person for crime works any forfeiture of any property, except in cases in which forfeiture is expressly imposed by law." Under a statute similar to section 674 it was held in *Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111, that the suspension of the civil rights of the person sentenced to imprisonment in a state prison for a term less than life did not suspend the civil rights of his creditors, and that they still had the right to subject the property of the person so sentenced to the satisfaction of their judgment; and that no consequences follow, except such as are declared by the statute. Appellant invokes the rule *expressio unius, et cetera*, and argues that the consequences of civil death are such that the only rights reserved are those enumerated in section 675. If this be conceded as to the person sentenced, still it does not follow that the creditors lose all rights. He may be entitled to bring an action, but actions may be brought against him: 6 Am. & Eng. Ency. of Law, 65, tit. "Civil Death," and cases cited. The pro-

ceeding before us is not against the defendant, but against his creditor. The action was begun before defendant's trial on the criminal charge, but judgment was not entered until after his conviction. But we think plaintiff had a right to enforce the judgment subsequently entered. We cannot agree with appellant that civil death is identical in law with physical death. We are referred to *Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111, where it was said: "If ⁵⁶⁶ the convict be sentenced for life he becomes *civilter mortuus*, or dead in law, in respect to his estate, as if he was dead in fact." That case called for no expression of opinion as to the consequences following a life sentence, and the declaration was therefore obiter. Our statute now makes the life convict a competent witness in criminal actions and capable "of making and acknowledging a sale or conveyance of property": Pen. Code, sec. 675. If he may sell his property we can see no reason why his property may not be taken to pay his debts.

4. Error is claimed because the court refused to admit evidence that at the trial of defendant on the charge of murder his counsel interposed the plea of insanity. There was no claim made by appellant at the hearing of this citation that defendant was in fact insane; on the contrary, appellant expressly refrained from taking that position, and it must be presumed from the fact that defendant was convicted that the plea of insanity, if offered, did not prevail. Appellant was, therefore, not prejudiced by excluding this evidence, even if it were material, which we do not think it was.

5. The principal question presented is whether the money was protected from process because in *custodia legis*.

It was held in *Hathaway v. Brady*, 26 Cal. 581, where money is deposited with the sheriff by a defendant to procure the release of an attachment, it is in the custody of the law; but, as was said in *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, this is true because the money thus deposited becomes "a symbol of and stands in place of the attached property." In the *Kimball* case it was said: "It is only where property is lawfully taken by virtue of legal process that it is in the custody of the law, and not otherwise": Citing *Gilman v. Williams*, 7 Wis. 334, 76 Am. Dec. 219. It is generally held to be the law that property taken from a prisoner on his arrest by an officer charged with that duty is not, while in the hands of such officer, subject to levy, and cannot be reached by the process of garnishment, the reason being that to hold otherwise would lead to a grave abuse

of criminal process: 1 Freeman on Executions, sec. 130 a; 2 Freeman on Executions, sec. 255. Mr. Freeman says, supra: "This exception is not strictly on the ground that the property is in the custody of the law, for the charge under which the arrest was made may ⁵⁶⁷ not relate to the property taken from the prisoner, and under no circumstances could it affect the title thereto."

In the case here the money was not taken at the time of the arrest, nor from the person of the defendant, and had no connection whatever with the cause of the arrest. Appellant came into possession of it by direction of defendant, and with his consent. Appellant is neither more nor less than the bailee of defendant. He does not hold the money in his official capacity, and owes no duty to disburse it in such capacity, and we think it may be reached by garnishment: Mechem on Public Offices, sec. 876; Waples on Attachment, sec. 411, citing the instructive case *Ex parte Hurn*, 92 Ala. 102, 25 Am. St. Rep. 23. Appellant makes the shadowy claim that the money was necessary at the trial to aid in establishing defendant's sanity. But the evidence is that it was not introduced at the trial, and it appears to us it was in no sense necessary to have the money in court to show the fact upon which appellant relied to prove defendant's sanity. The important fact was that he told with accuracy how much money he had and where it could be found. That could be conclusively proved without profert of the money itself. Suppose the money had been lost by or stolen from appellant before the trial of defendant; would there have been any difficulty in proving the essential fact bearing upon defendant's sanity? Certainly not. It seems to us quite clear that this money was not in the custody of the law, although in the custody of an officer of the law. The custody of the officer is not necessarily nor always the custody of the law. We are not called upon to say under what circumstances property taken from or belonging to a prisoner will be protected from civil process in civil actions against the prisoner. The decisions are not altogether harmonious upon the question. But we are satisfied that the property in the present case does not come within the reason of the rule and ought not to be placed within its operation.

The order should be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Henshaw, J., Temple, J., McFarland, J.

EXECUTION — SUPPLEMENTARY PROCEEDINGS. — THE SUFFICIENCY OF THE AFFIDAVIT in proceedings supplemental to execution is discussed in the monographic note to *Lathrop v. Clapp*, 100 Am. Dec. 505, on proceedings supplemental to execution. The affidavit need not specify the property owned by the debtor which he refuses to apply to the satisfaction of the judgment: *Magruder v. Shelton*, 98 N. C. 545, 2 Am. St. Rep. 349.

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONSTITUTIONALITY.—Section 720 of the California Code of Civil Procedure, which purports to authorize a judge, by order, to permit a judgment creditor to institute and maintain an action against an alleged debtor of the judgment debtor, is not unconstitutional and void on the ground that the debtor has no notice under it of the supplementary proceedings, after judgment, affecting his rights of property, nor on the ground that his debtor may be compelled to pay the debt twice: *High v. Bank of Commerce*, 95 Cal. 386, 29 Am. St. Rep. 121. Compare *Horstman v. Kaufman*, 97 Pa. St. 147, 39 Am. Rep. 802.

CIVIL DEATH—PROPERTY RIGHTS.—A convicted felon may be sued and his property seized by his creditors after conviction. He may also dispose of it by will or deed. Hence, he is neither dead in fact nor in law: *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784. For an exhaustive discussion of this subject, in many of its phases, see *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, and monographic note thereto on civil death, and the extent to which it is recognized in America.

PROPERTY IN THE CUSTODY OF THE LAW IS NOT SUBJECT TO ATTACHMENT, GARNISHMENT, OR EXECUTION: *Hackley v. Swigert*, 5 B. Mon. 86, 41 Am. Dec. 258. Compare *Holker v. Hennessey*, 141 Mo. 527, 64 Am. St. Rep. 524, on the attachment or garnishment of property taken from a prisoner. But custody of the law is such custody only as an officer has a right to assume over specific property by virtue of law, or by virtue of the mandate contained in his writ: *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

SMUGGLER UNION MINING COMPANY v. BRODERICK.

[25 COLORADO, 16.]

EVIDENCE—EXPERT TESTIMONY.—After a witness has testified what is the right and what the wrong way to run a stope in a mine, and how the particular stope in question was run, and has accurately described the place in which plaintiff was working at the time of an accident, it is error to permit such witness to answer a hypothetical question based upon such testimony, whether he considers such stope, thus made, an ordinarily safe place for a man to work in. The jury are just as well qualified to determine such question as the witness, and, in such case, opinion evidence is not admissible.

EVIDENCE—EXPERT TESTIMONY.—If the question under consideration is one concerning which jurors of ordinary capacity, experience, and accomplishments, such as are possessed by the average man, are competent to decide, the opinion of an expert is not admissible.

APPELLATE PRACTICE—REVERSIBLE ERROR.—Reversal of a judgment must be directed on appeal, unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the complaining party.

Wolcott & Vaile, for the appellant.

J. W. Taylor, for the appellee.

¹⁶ CAMPBELL, J. The plaintiff brought this action to recover damages for personal injuries sustained by him while working as a helper for a timberman in a certain stope of the defendant's mine, which were alleged to have been caused by the negligence of the defendant in failing to construct and carry up the stope, ¹⁷ in which the injuries were received, in an ordinarily safe and prudent manner. The answer denied the

alleged negligence, and pleaded negligence of plaintiff contributing to the injury.

Upon the evidence submitted, and under the instructions of the court, the jury returned a verdict for the plaintiff, upon which the court entered judgment, to reverse which the defendant company prosecutes this appeal.

A number of errors have been assigned and discussed; but, in our view, it is necessary to consider only one of them, for its commission necessitates a reversal of the judgment. Some of the other questions argued are not properly in the case, and still others may not again arise; hence, a determination of them is not required.

Counsel for the plaintiff called as a witness a miner, qualified to speak in that behalf, to testify as to the proper manner to carry up a stope, and the witness told how it should be done. Then, in the form of a hypothetical question, based upon the testimony showing the manner in which the stope in question was constructed, asked of the witness if he considered such a place, thus made, an ordinarily safe place for a man to work in, to which the witness replied that it was not a safe place. Substantially the same questions were asked of other witnesses by the plaintiff, and the same answers given.

Such evidence was inadmissible, and the rulings of the court thereupon were erroneous. After the witnesses had fully testified what was the right, and what the wrong, way to run a stope, and then how this stope was run, and had accurately described the place in which plaintiff was working, the jury were just as well qualified to determine whether it was reasonably safe as were the witnesses themselves. Indeed, it was the very thing which the jury were empaneled to determine. It was not, as was the question in *Colorado Midland R. R. Co. v. O'Brien*, 16 Colo. 219, a question involving peculiar skill and science. In such cases, under a well-recognized exception to the general rule, the opinion of an ¹⁸ expert may be given. This is because of the necessities of the case. But where, as here, the question was one concerning which jurors of ordinary capacity and experience, and accomplishments such as are possessed by the average man, are capable and competent to decide, the opinion of an expert should not be admitted.

This court has been very liberal—beyond that of most courts—in admitting testimony of this character, but never, under such a state of facts as this record discloses, has gone to the extent allowed in this case. When the witnesses were permitted

to testify what was the right, and what not the right, way to construct the stope, certainly that was as far as they should have gone. When the court, over defendant's objection, permitted them to draw, as an inference, from this testimony that the place in question was not safe, and so to testify, that was an usurpation of the function of the jury.

That the error committed is reversible seems also well settled by the authorities. In a case involving the same principle, this court in *Denver etc. R. R. Co. v. Wilson*, 12 Colo. 20, used this language: "It is impossible to say that the admission of this testimony was error without prejudice; it may have been the very thing that induced the jury to find negligence on the part of the defendant." The rule upon this question has been laid down by the supreme court of the United States in numerous cases which we approve, as the one to be followed in this jurisdiction.

In *Deery v. Cray*, 5 Wall. 795, in answer to the argument that a judgment should not be reversed when the error complained of works no injury, Mr. Justice Miller, speaking for the court, says: "But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not, and could not, have prejudiced the party's rights."

Expressly reaffirming these announcements of the rule are *Smiths v. Shoemaker*, 17 Wall. 630; *Gilmer v. Higley*, 110 U. S. 47; *Vicksburg etc. Meridian R. R. Co. v. O'Brien*, 119 U. S. 19, 99, where this phraseology is employed: "It is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party." Also *Mexia v. Oliver*, 148 U. S. 664, and *Boston etc. R. R. Co. v. O'Rielly*, 158 U. S. 334.

Because of the error of the district court in the admission of this evidence, the judgment is reversed and the cause remanded for a new trial.

EXPERT TESTIMONY as to a matter within the common knowledge of the jury is inadmissible: *Alabama Mineral R. R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. Rep. 121, and note. Monographic note to *Hammond v. Woodman*, 66 Am. Dec. 228. When the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions and inferences must be drawn by the jury: *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412.

APPELLATE PRACTICE.—Error is presumptively prejudicial, and one claiming it to be otherwise must show its innocuous character: *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900; *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50; *State v. Bowles*, 146 Mo. 6, 69 Am. St. Rep. 598.

HOTTELL v. FARMERS' PROTECTIVE ASSOCIATION.

[25 COLORADO, 67.]

DAMAGES—MEASURE OF.—In an action to recover for wrongfully preventing the use of water power for an elevator, the cost of substituting steam power is the proper measure of damages.

DAMAGES—AMOUNT OF RECOVERY—STIPULATION.—In an action to recover damages, recovery to a date subsequent to the time of bringing the action may be permitted if the parties have stipulated to that effect in case any damages are awarded.

CONVEYANCES—COVENANTS RUNNING WITH LAND—WATER POWER RIGHTS.—If a party owning a mill and elevator situated upon adjoining tracts of land, the elevator being operated by water power from the mill race conducted to the elevator by machinery connected with and part of the mill tract, sells and conveys the elevator and tract of land on which it is situated, together with a grant of perpetual water power to operate the elevator, and a perpetual use of all machinery necessary to the successful application of the water power to such purpose, such grant conveys not only a license to use the water power, but the right to have that power delivered so as to operate the elevator without further cost than the purchase price paid. Such grant is a covenant running with the land, and a subsequent purchaser of the mill and mill tract of land is obliged to fulfill the covenant. If the mill and machinery are destroyed by fire subsequently to the grant, it is still the duty of the owner of the servient estate to continue to furnish the water power for the elevator.

Action to compel the defendant to furnish water power. On March 19, 1884, B. F. Hottell owned two adjacent tracts of land, upon one of which was situated a grain elevator, and upon the other a flouring mill. On the latter tract was a mill race and at the end thereof an iron pipe conveying water on to a water wheel connected with the mill machinery, thus furnishing the motive power for the mill, and by a sprocket chain connected with such machinery power was transmitted to the elevator. On the day mentioned, for the sum of twenty thousand dollars, Hottell conveyed to the Farmers' Protective Association, the land on which the elevator was situated, and the perpetual use of such water power and all machinery necessary to apply power to the elevator. In estimating the value of this property, the elevator was valued at one-half of the sum paid, and the water right and use of machinery at a like sum. On August 24, 1886, Hottell sold and conveyed to the defendant company the tract of land containing the mill, mill race, and machinery, by quitclaim deed containing no express assumption by the grantee of Hottell's obligation to furnish such water power. On July 10, 1886, such mill and machinery were destroyed by fire; the mill was rebuilt and new machinery for utilizing such water power was put in in the early part of 1887. The defendant company,

soon after acquiring possession, denied to plaintiff, and excluded it from, the use of such water power and machinery, and refused it access to said premises for the purpose of availing itself of such means as it might employ to make application of such power, although the defendant company had actual, as well as constructive, notice of the contents of the deed from Hottell; and of plaintiff's claim to the use and benefit of such water power and machinery, and of such use from the time of its purchase to the time when the defendant company went into possession under its conveyance. Plaintiff recovered judgment for six thousand dollars' damages and a decree establishing its right to the perpetual use of the water power and machinery, and enjoining the defendant company from interfering therewith, and commanding it to furnish such power and machinery necessary to enable plaintiff to enjoy such use. Defendants appealed.

W. C. Kingsley, T. J. O'Donnell, and M. Smith, for the appellants.

W. H. Smith and W. B. Herr, for the appellee.

70 CAMPBELL, C. J. Of the two branches of this case, one relates to the money judgment. Quite independently of the other questions as to **71** the duty of the defendants to furnish water power, it is clear that both defendants should respond in damages for the wrongs committed by them. It is here conceded that the plaintiff company had the right to the use of the millrace as the source of its water power, though the extent of the right as claimed is denied.

The mill race was on the defendants' premises, and for a series of years they obstructed the plaintiff in the use of the original appliances for delivering power to its elevator. They denied plaintiff access to their premises, whereby it might have availed itself of other means of transmission. But if such access had been permitted, it was valueless, because the defendants so built the second mill over the point of fall of water that its benefits could be utilized only in connection with the machinery of the mill. The plaintiff, thus excluded from its admitted rights, was obliged to, and did, through the instrumentality of a steam-engine and its appliances, obtain a motive power for its elevator. The rule of damages adopted by the trial court was the reasonable cost to plaintiff of this steam power. Upon conflicting testimony estimating this cost from fifty cents to four dollars per day, the court awarded damages in the sum of six thousand dollars.

It is true that defendants make the point that the court erred in not limiting damages to the beginning of the action, but allowed a recovery to October 5, 1895, the time when the second mill was burned. This point might be good were it not, as recited in the findings and decree, the parties themselves stipulated that if the court awarded damages at all, the time might be extended to the latter date. This finding as to the amount of damages, as well as all other findings of fact, as set out in the foregoing statement, are supported by the evidence and conclusive upon us in this review.

The second branch presents much more important and difficult questions. For convenience it may be resolved into two subdivisions, though examination of the one involves more or less consideration of the other. The first inquiry is, What rights did Hottell sell and convey to the plaintiff? The ⁷² second, the nature and extent of the duty and liability of the defendants to the plaintiff in the matter of supplying motive power. The defendants contend that all that was conveyed was a mere right to use water from the mill race by means of the machinery in existence at the time of the sale; that these rights were in the nature of a license only, and did not amount to an easement. But this construction is altogether too narrow. The language does not import such meaning, and had the grantor intended to restrict the rights conveyed, either as to time or extent, he would have used apt words of limitation.

Neither could it have been the intention of the grantee to pay ten thousand dollars for something that could be enjoyed, at most, during the wear of machinery, which, under the most favorable conditions, could last only for a brief period. We must look to the substance of this transaction, and, if necessary, beyond the literal terms of the grant, to ascertain the intent of the parties to it; and, in the light of the facts, and considering the nature of the rights in controversy, we are clearly of the opinion that Hottell sold, and the plaintiff bought, not merely a water power, but the right to have that power delivered to its elevator so as to operate the same, and without any further cost to it than the purchase price paid. There is no limitation in the deed restricting the utilization of water power to any particular machinery, or its means of transmission to any designated mode; but the language is "the use of water from that mill race perpetually to furnish power to operate and run the elevator; also the perpetual right to use of all the machinery," not machinery then in esse, but "all the machinery necessary to the

successful application and use of said water power to operate said elevator."

This naturally leads to a consideration of the other subdivision concerning the nature and extent of defendants' liability under the grant. We suppose it will be conceded that, in legal effect, this grant is as extensive as if there had been in the deed a covenant binding the grantor, his heirs, and assigns, to furnish perpetual water power. Certainly, ⁷³ both upon principle and authority, a grantor's obligation, which arises from an executed agreement in the form of a grant, is, to say the least, as comprehensive as a covenantor's agreement would be under a covenant. In legal contemplation the grant is as burdensome to the grantor, and as beneficial to the grantee, as, in these particulars, a covenant would be to the covenantor and covenantee.

But, the defendants say, this grant transferred to the plaintiff a mere license; that the thing granted was in the nature of a personal covenant, binding only upon Hottell, and if, upon his grantee at all, only so long as the mill and existing machinery lasted; and when, through no fault of the owner, they were destroyed, the privilege or right was extinguished; that the right did not constitute an easement; in short, that the obligation of the grantor was not, in effect, a covenant running with the land.

So to hold manifestly would not carry out the intention of the parties. It is not reasonable to suppose that any sane man, capable of contracting, would pay ten thousand dollars for a perpetual water power and a perpetual right to use facilities for its transmission from where it was generated to the place of application, and rely solely upon the personal responsibility of the grantor and his personal representatives for a fulfilment of the contract; when the next day the grantor might become bankrupt, or the right purchased become valueless by a mere transfer of the land over and to which the easement in question attaches. The fact that the rights conveyed were perpetual shows that they would continue long after the death of the grantor; and even if the elevator itself should have burned, the right itself was not lost; and to enjoy a perpetual right such as this was possible only in connection with the servient estate, and by compelling its owner to keep the engagement, whether he be the grantor or his assignee. No reasonable man would be likely to trust to the uncertain chance of recovering for a breach of contract from the grantor, or his personal representative. Moreover, this water power could lawfully be supplied only by

the owner ⁷⁴ of the land to which the easement attached, or by some one acting under his authority; and parties would not, in a case of such importance as this, trust to a personal guaranty, which the grantor might so easily put beyond his power to perform. The intention of the parties, therefore, unquestionably was to place the burden of the easement not merely upon the grantor, but upon the servient estate and its owner; and the language of the grant effectuates that intention. There is no reason why parties may not make such a contract; and such a covenant running with the land is obnoxious to no rule of common or statutory law.

Spencer's case, 5 Coke, 16, reported in 1 Smith's Leading Cases, ninth edition, page 174, is the leading case on covenants running with the land. The case itself and notes, especially of the American editor, contain much learning upon an interesting and intricate subject. It is said in the American notes that: "The English editor expresses great doubt whether covenants entered into by the owners of land in any case run with the lands, so as to bind the assignee of the covenantor. It is clearly settled in this country that they will, and the argument that 'an inconvenience which would be the result of holding them to do so is that the assignee would frequently find himself liable to contracts of the very existence of which he was ignorant, and which, perhaps, would have deterred him from accepting a conveyance of the land, if he had known of them,' has no application under the system of registration in force here."

In this connection it is pertinent to observe that not only was the deed from Hottell to the plaintiff placed upon the record before the defendant company acquired any rights to the premises retained by Hottell, but the evidence tends to show that it had actual knowledge of the plaintiff's claim, and that its representatives, at the time of the purchase, were upon the premises in question, and for themselves could, and did, see the use which the plaintiff was making of the mill and its machinery, and from the physical evidence there apparent was charged with notice of plaintiff's claim.

⁷⁵ A case quite similar to the one at bar is *Fitch v. Johnson*, 104 Ill. 111. A company, owning a tract of land on which were a dam and water power, and an adjacent tract upon which was a flouring mill, sold the latter and two thousand five hundred inches of water for operating the same, and agreed to keep the dam and its appliances in repair, as they constituted the only means of supplying the water power. Afterward the company

conveyed the dam and the land on which it was situated, and the grantee of the flouring mill also sold its mill and water right. The grantee last mentioned then brought suit against the other grantee for failure to repair the dam, and the court held that the benefit of the covenant passed with the land of the covenantee, and the burden with that of the covenantor. The case is an instructive one, and clearly is authority for the ruling of the district court in the pending case.

Summing up the doctrine upon this question, the American editor, Spencer's case, 1 Smith's Lead. Cas., 9th ed., 215, says: "In the cases of this class, a burden to do or forbear from doing some act directly concerning or touching the land is imposed on land of the covenantor for the benefit of land of the covenantee, and he who takes the land of the covenantor takes it cum onere, and he who takes that of the covenantee takes it with the benefit of the covenant. In other words, an easement, or something in the nature of an easement, is created, the benefit of which will run with the dominant estate of the covenantee, or the burden with the servient estate of the covenantor, or both."

That privity of estate is present is not denied, and that the covenant for quiet enjoyment is broken seems beyond question. Other authorities in support of our conclusion that the burden of this easement, or privilege, is on the servient estate and its owner are: *Morse v. Aldrich*, 19 Pick. 449; *Norcross v. James*, 140 Mass. 188; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Easter v. Little Miami R. R. Co.*, 14 Ohio St. 48; *Hilliard on Real Property*, 390-392, pars. 37, 48-50; *Williams on Real Property*, 17th ed., 176, 471; *Tiedeman on Real Property*, sec. 862; 1 *Washburn on Real Property*, 4th ed., 495; 2 *Washburn on Real Property*, 4th ed., 284-287; 2 *Sugden on Vendors*, 6th Am. from 10th Eng. ed., 468, 484; authorities referred to in *Spencer's case*, 5 Coke, 16, 1 Smith's Lead. Cas., 9th ed., 174.

We are, however, referred to cases holding that when the servient estate is destroyed through no fault of its owner, the easement is extinguished. To this effect are *Duncan v. Rodecker*, 90 Wis. 1; *Shirley v. Crabb*, 138 Ind. 200, 46 Am. St. Rep. 376; and others that might be cited. The ground upon which all of these cases hinge is that when the reason which called the easement into existence ceases, the easement itself no longer exists. This principle is sought to be applied to the case before us. The fallacy of the argument in support of this attempt is the unwarrantable assumption that the easement in question attaches only to the mill and machinery in esse when the easement was cre-

ated, as contradistinguished from the soil, of which they are but a part. Hereinabove we have shown that this position is untenable. In addition to what we have there said, we add that when this mill and machinery were burned, the reasons for the existence of the easement did not cease, but survived. The easement attached to the land itself on which the mill and its appliances were erected. While the privilege which the plaintiff had in and over this land, viz., the right to have the water power thereon generated and delivered to its elevator, could be enjoyed by means of the mill and its machinery, it was not altogether dependent upon them, but other appliances for utilizing the power might be employed. The right to have the power delivered, not in any certain way, but the absolute and unqualified right to have this water power delivered at its elevator without cost, was what the plaintiff bought and paid for, and such was the nature of its easement in and over the land of the defendants. This being so, the easement was not extinguished when the mill burned, but merely suspended.

We are here met by the argument that this conclusion makes it the duty of the owner of the land on which the mill was ⁷⁷ situate, in case of its destruction, to rebuild in order to furnish water power to the plaintiff. This does not necessarily, or at all, follow. Whether or not the defendant company is obliged to rebuild its mill is not a question in this case. We do hold, however, that it is the duty of the owner of this servient estate to continue to furnish water power to the plaintiff after the mill burned. But, as the defendants themselves have strenuously contended throughout this case, there are other means besides the mill and machinery for the utilization of this power. The fact remains that the mill was rebuilt, and its owners were then in a position readily, and at but slight cost, to supply the plaintiff with water power; and the law is, that upon the restoration or reconstruction of the thing through and by means of which an easement is enjoyed, the easement itself is restored and revived, even though there was no obligation on the servient owner to restore the servient thing: Washburn on Easements, 3d ed., sec. 8, p. 686.

It follows from the foregoing that the judgment and decree of the district court should in all respects be affirmed, and it is so ordered.

THE MEASURE OF DAMAGES for injury to property is not always the sum of money which it would take to repair the injury, or to restore the property to the condition it occupied before the

injury. In those cases where the cost of restoring it to its original condition will exceed its actual value, the value of the property, and not the cost of removing the injury, will be the proper measure of damage: *Harvey v. Sides Silver Min. Co.*, 1 Nev. 539, 90 Am. Dec. 510.

DAMAGES.—STIPULATIONS for specified damages on the breach of a contract are enforceable: *Mónmouth Park Assn. v. Wallis etc. Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626. When an offer of compromise in court will not be allowed to stand: *Hecht v. Metzler*, 14 Utah, 408, 60 Am. St. Rep. 906.

COVENANTS RUNNING WITH LAND.—As to what covenants run with the land and what do not, see *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545; *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521, and note; monographic notes to *Morse v. Garner*, 47 Am. Dec. 569; *Ladd v. Boston*, 21 Am. St. Rep. 484.

PUEBLO ELECTRIC STREET RAILWAY CO. v. SHERMAN.

[25 COLORADO, 114.]

NEGLIGENCE OF CHILDREN.—The law fixes no arbitrary period when the immunity of childhood ceases and the responsibility of life begins, and minors, not *prima facie sui juris*, are charged with such care only to avoid danger as may be fairly and reasonably expected from persons of their age; and that is a matter to be determined in each case by its own circumstances.

NEGLIGENCE OF CHILDREN—QUESTION FOR JURY. If there is a fair doubt as to the child being of the age and capacity that in law it should be held responsible for the act contributing to its injury, the question should not be submitted to the jury to say whether this is so or not.

NEGLIGENCE OF CHILDREN—QUESTION FOR JURY. If a boy, thirteen years of age, possessing usual intelligence, is injured in alighting from a moving street-car, it is a question for the jury whether or not, taking into consideration his age and the attendant circumstances, he was guilty of contributory negligence in thus alighting from the car.

NEGLIGENCE TO CHILDREN—STREET RAILWAYS.—It is negligence for the motorman on a street-car to allow a boy thirteen years old, not a passenger, but riding for amusement, to alight therefrom while the car is in motion, for the purpose of turning the trolley, and the company is liable in damages for an injury thus received by the boy.

NEGLIGENCE TO CHILDREN—STREET RAILWAYS—INSTRUCTIONS.—In an action to recover for an injury to a boy thirteen years of age possessed of usual intelligence, caused by alighting from a street-car while in motion, where he was riding, not as a passenger, but for amusement, it is error to refuse to instruct the jury that, if he had been warned of the danger of alighting from a moving car, he was guilty of negligence precluding his recovery, when there was evidence of such warning.

NEGLIGENCE—EVIDENCE—ADMISSIONS.—In an action to recover for personal injury caused by negligence, if a witness testifies that plaintiff, shortly after the injury, stated that he himself was to blame therefor, and plaintiff testifies that if he made such statement, which he does not remember, it was made under the influence of drugs given to alleviate his pain, the defendant may introduce evidence to prove that the statement was made before any drug was administered to plaintiff.

Waldron & Devine, for the appellant.

J. R. Dixon, for the appellee.

¹¹⁸ GABBERT, J. Counsel for appellant insist: 1. That the act of the motorman, in allowing appellee to ride without payment of fare, was in direct violation of his orders, without the scope of his authority, and having no proper permit to ride, the company was under no obligations to appellee as a passenger; 2. That appellee, by reason of his age, was capable of comprehending the danger incident to alighting from a moving car, and his act in this respect being the proximate cause of the accident, he is precluded from maintaining this action. These propositions will be considered together.

The proximate cause of the injury was the act of appellee in voluntarily alighting from the car while in motion, and, were it not for his age, it would be unnecessary to pursue this inquiry further, because, in the case of an adult of that age and experience, when he would be presumed to be able to comprehend the consequences of his acts, alighting from a car under similar circumstances, and being thus thrown down and injured, would constitute contributory negligence, and preclude any recovery for the damages thus sustained, so that the first important question to determine is, whether or not appellee shall be held responsible, as a matter of law, for his negligence which contributed to the injury of which he complains. There must be some age when a minor, who has not attained his legal majority, will be held responsible for his acts, and when, by reason of his age, the question of his responsibility for such acts becomes one of law, and not of fact. Courts are widely variant on this question, so far as ¹¹⁹ age is concerned. For such acts "the law fixes no arbitrary period when the immunity of childhood ceases and the responsibility of life begins": *Nagle v. Allegheny etc. R. R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413. It only imposes upon minors not *prima facie sui juris* the duty of giving such attention to their surroundings and care to avoid danger as may be fairly and reasonably expected from persons of their age: 1 *Thompson on Negligence*, 431; or the caution which a child is required to exercise is according to its maturity and capacity—a matter to be determined in each case by the circumstances of that case: *Consolidated City etc. Ry. Co. v. Carlson*, 58 Kan. 62; *Railroad Co. v. Gladmon*, 15 Wall. 401; 2 *Thompson on Negligence*, 1194; *Chicago etc. Ry. Co. v. Becker*, 76 Ill. 25.

If there is a fair doubt as to the child being of the age and

capacity that in law it should be held responsible for the act contributing to its injury, the question should be submitted to the jury to say, by their verdict, whether this is so or not: 2 Thompson on Negligence, 1182. In this case appellee was upward of thirteen years of age at the time of the accident; had lived for a year on the street over which the car was operated; appears to have possessed the usual intelligence of boys of that age, and would be presumed to comprehend many dangers to which he might be exposed; but was he capable of appreciating the danger to which he was exposed in this case, to such a degree that he should be held responsible for a failure to exercise reasonable care and caution to avoid it? He would only be required to give such attention to his surroundings and care to avoid danger as might fairly be expected from one of his years. He was still of that age when the instincts of childhood easily dominate. Was he capable of appreciating, or did he, on account of his youth, realize the dangers to which he was exposed in alighting from a moving car, to such a degree as would prompt him to be reasonably careful in so doing, or refrain from it entirely? No fair and impartial mind could say, from the evidence in this case, taking into consideration all of the surrounding circumstances, that the question of whether appellee should ¹²⁰ be held responsible for his contributory negligence, was entirely free from doubt. In principle, under the evidence, this question is akin to those where it is proper for a jury to determine, although the facts are undisputed, whether they establish negligence, regarding which it was said by Mr. Justice Hunt, in speaking for the supreme court of the United States, in *Railroad Co. v. Stout*, 17 Wall. 657: "Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education; men of learning and men whose learning consists only in what they have themselves seen and heard; the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know

more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In this case, taking into consideration the age of appellee, and all the attendant circumstances connected with the accident, we think it was proper to submit to the jury the question of whether or not he was responsible for his negligence in alighting from the car while in motion, or exercised that degree of care and caution in so doing which would be required and expected of him under the circumstances.

It now becomes necessary to determine whether or not appellant was guilty of negligence in permitting appellee, through its motorman, to ride upon the car, alight therefrom when in motion, without any effort upon his part to restrain him from such acts. Whatever is done by the servant in the ¹²¹ course of his employment the master is liable for, whether such act be one of omission or commission: Philadelphia etc. R. R. Co. v. Derby, 14 How. 468; Story on Agency, sec. 452. This rule is based upon the maxim, "He who does a thing by the agency of another does it himself." Courts frequently experience difficulty in determining whether the act of the servant upon which it is sought to fix the liability of the master was one in the course of the employment for which the servant was engaged, and the test to apply for the purpose of ascertaining the master's liability, when that question is presented, is that for every act of the servant in the course of his employment, and within its scope, the master is liable if he would have been liable for the same act if done by himself in the performance of the same service for which the servant was engaged: Wood's Law of Master and Servant, secs. 280, 322; Russell v. Irby, 13 Ala. 131. A street railway company is a common carrier, with duties similar to those of a railroad company: Booth's Street Railway Law, sec. 324; and in operating its cars is required to observe at least ordinary care, vigilance, and skill, so far as the rights of third persons may be affected by running its cars along the street of a crowded city. In these operations the invisible corporation, though not actually, is constructively, present through agents representing it, and whose acts, within their respective representative spheres, are its acts: Louisville etc. R. R. Co. v. Collins, 2 Duvall, 114, 87 Am. Dec. 486. The motorman was charged with the management and control of the car; it was his special duty, regardless of instructions, to exercise reasonable care and diligence in operating it so as to prevent injury

to those with whom the relation of carrier and passenger did not exist. The evidence discloses that appellee was permitted to ride upon the car for a period of something over two hours; allowed to alight while the car was still in motion, for the purpose of turning the trolley; he was not upon the car as a passenger, but there because the permission granted to ride and turn the trolley afforded him amusement, which would be naturally attractive to one of his years. To allow children to make a ¹²² playground of a moving street-car, or convert that vehicle when so moving into an article of amusement, is certainly exposing them to serious, if not fatal, injuries, and it is as much the duty of the employés of a street-car company to exercise reasonable care and diligence in preventing those not capable of appreciating the danger to which they would be exposed on account of their childish proclivities to amuse themselves in the manner appellee did, as it is their duty to prevent injury to persons of like age exposed to injuries in other ways from the same source. Had the motorman not permitted appellee to ride upon the car merely for amusement, alight therefrom recklessly while in motion, but, on the contrary, had exercised a reasonable degree of care in preventing him from so doing, the injury might not have occurred. It is contended, however, that appellee was a trespasser, and, therefore, the company was under no obligation to him, except to refrain from wanton or willful injury. Had appellee been injured while upon the car by its negligent management or control, then the relationship which appellee sustained to the company would become important, but he was not so injured, and no such question is presented for determination in this case. It has been settled by a long line of decisions that the care and caution required of a child must be measured by its maturity and capacity only, to be determined in each case by the circumstances of that case: *Lynch v. Nurdin*, 1 Q. B. 29; 2 *Thompson on Negligence*, 1140; *Railroad Co. v. Stout*, 17 Wall. 657. In the latter case, and others in which the facts were similar, and known generally in legal literature as "the turntable cases," the plaintiff was injured by unguarded dangerous agencies upon the land of the defendant; but, being an infant, though technically a trespasser, was permitted to recover upon the principle that the natural instincts of the child brought it in contact with the means of danger which the negligent act of the defendant had left exposed (2 *Thompson on Negligence*, 1195), a principle applicable to the case at bar, for the negligence of appellant consisted in the failure to use ordinary care to prevent

appellee indulging his childish instincts, ¹²³ and thus expose himself to the means of danger which resulted in his injury. It was not error for the court to refuse the motion for nonsuit, or refuse to instruct the jury to return a verdict for appellant.

The instruction prayed by appellant and refused, upon which refusal error is assigned, was to the effect that if appellee, previous to the injury, had been warned of the danger of alighting from a moving street-car, was thirteen years of age and upward at the time of the accident, and possessed of the intelligence usual for boys of that age, he was guilty of negligence, which would preclude his recovery.

The danger to which appellee was exposed by leaping from a moving car was not hidden or difficult of comprehension. He had reached that age when, explicitly informed of such danger, it should have created an impression upon his mind which he should have heeded. If, after being so informed, he still chose to voluntarily incur the danger regarding which he had been warned, he should be held responsible for his want of care in this respect. In case of one more youthful, or where the danger was not patent, such an instruction might not be proper, because of the inability of the person thus warned, on account of his youth, to comprehend the character of the danger regarding which he was advised, or remember that he had been so informed; but, in case of a boy of the age of appellee at the time of the accident, the fact that he had been told of the danger to which he was exposed by previous acts of a character similar to that which was the proximate cause of his injury, should have been sufficient, if of the usual intelligence and experience of boys of that age, to have prompted him to avoid such danger in the future, and, if he did not, would himself be in fault. The instruction given on the subject of contributory negligence was a correct statement of the law, in so far as it directed the jury to determine the capability of appellee to appreciate the danger to which he exposed himself, from a consideration of the particular matters therein mentioned, but was silent on the subject as to what the law was in the event the evidence ¹²⁴ established he had been warned of such danger. This was the distinguishing feature between the instruction given and the one requested; and as there was evidence tending to prove that he had been previously warned of the danger incident to alighting from a moving car, the attention of the jury should have been particularly called to this phase of the case, by giving the instruction requested on this subject. On another trial, it is suggested that in case the

evidence again warrants the giving of instructions similar to those under consideration, they should be so framed that a jury will clearly understand that each question therein embraced must be passed upon.

It now remains to consider the ruling of the court upon the offer of appellant to show by a witness that, at the time it is claimed appellee made the statement he was to blame for the injury, he had not been given any drug or anaesthetic. Under the instructions given, the all-important question in this case for the jury to determine was the capability of appellee to appreciate the danger of alighting from a street car when in motion. It was proper to show he made the statement claimed, as tending to establish his degree of knowledge regarding such danger; it was also proper, on behalf of appellee, to have the statement before the jury that at the time he made such statement his mind was affected by some drug, given for the purpose of alleviating pain; and certainly it was proper for appellant to show, if it could, that at the time he made the statement he had not been given such drug. If the jury had found, as a matter of fact, he made the statement, but also believed from the evidence it was made when laboring under the influence of some drug, very likely little or no weight would be attached to a statement by appellee made under those conditions; but, had they also found, had there been evidence to warrant it, that appellee was not affected in the manner claimed, it might have had some effect upon the minds of the jurors as to the weight which should be given such a statement. We cannot say what weight any of this evidence may have had upon the jury—that was a ¹²⁵ matter for their consideration; nor can we say what influence the evidence excluded might have exerted upon their minds. All we have to deal with is the materiality or immateriality of such evidence. It was error for the trial court to refuse the offer of appellant to introduce the proposed evidence. The judgment is reversed, and the cause remanded for a new trial.

NEGLIGENCE OF CHILDREN.—An infant of tender years is deemed, in law, not possessed of sufficient discretion to be guilty of negligence for its failure to exercise due care for its safety: *Evansville v. Senhenn*, 151 Ind. 42, 68 Am. St. Rep. 218. When a child has reached the age of discretion, the degree of care and caution required of him is no greater nor higher than such as is usually exercised by persons of similar age, judgment, and experience; and whether that degree of care and caution has been exercised by the child in a given case is usually, if not always, a question of fact for the jury: *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 55 Am. St. Rep. 620; *Railroad Co. v. Mackey*, 53 Ohio St. 370.

53 Am. St. Rep. 641. The question whether or not the mind of a boy ten years of age is sufficiently mature to make him responsible for his contributory negligence is a question of fact for the jury: *Avey v. Galveston etc. Ry. Co.*, 81 Tex. 243, 26 Am. St. Rep. 809; *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935. On the negligence of infants, see the extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590.

THE ADMISSIONS of a party are competent evidence against him: *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258.

CACHE LA POUDRE IRRIGATING COMPANY v. LARIMER AND WELD RESERVOIR COMPANY.

[25 COLORADO, 144.]

WATERS AND WATERCOURSES—TRANSFER OF STOCK AS TRANSFER OF WATER RIGHTS.—A transfer of stock in an irrigating ditch operates as a transfer of the right to the use of the water, as well as an interest in the corporation issuing such stock, when such corporation is formed of the cotenants owning the ditch and water rights, and such shares of stock represent not only the rights of the parties in the ditch, but also the right to the use of the water.

WATERS AND WATERCOURSES—SALE OF WATER RIGHTS SEPARATE FROM LAND.—There may be a sale of a water right separate from the land, and an application of the water to other land, so long as the rights of third persons are not infringed.

WATERS AND WATERCOURSES—PRIORITIES IN WATER RIGHTS.—The apportionment of water which the owners of a prior right make between themselves cannot be complained of by a junior appropriator, so long as no more water than the priority calls for is diverted from the common source, and so long as the consumers have a necessity for it, and apply it to a beneficial purpose.

WATERS AND WATERCOURSES—PRIORITIES IN WATER RIGHT.—Evidence that after a transfer of priorities in water rights more lands were irrigated from the common source of supply than before does not of itself necessarily establish an enlarged diversion or user of which a junior appropriator can complain.

J. E. Garrigues, for the appellant.

H. N. Haynes, for the appellee.

145 CAMPBELL, C. J. This is a writ of error to a judgment of the court of appeals, reversing the judgment of the district court.

To this action, as tried below, there were several defendants, the causes of action alleged against those not appearing upon the review in either appellate court being entirely distinct and separate from that averred against the present defendant in error, which was plaintiff in error in the court of appeals, and a defendant below. The grievance against this defendant is, that in buy-

ing a water right, separate from the land, and transferring the place of use to other lands, the subsequent use was thereby "enlarged," to plaintiff's injury. In its decree the district court enjoined the defendant from using, in times of scarcity, a certain quantity of the water thus sought to be transferred, until the plaintiff's priority was satisfied, but refused to restrain it in the use of a certain other quantity thereof, which relief the plaintiff also asked.

In the court of appeals, the defendant, as plaintiff in error there, assigned as error the granting of the injunction; and, the plaintiff, as defendant in error, assigned cross-errors to ¹⁴⁶ the refusal of the district court to give all the relief prayed. Upon a hearing in the court of appeals the decree was reversed, no relief being awarded to plaintiff, and the injunction theretofore granted was dissolved: *Larimer etc. Reservoir Co. v. Cache La Poudre Irr. Co.*, 8 Colo. App. 237.

The theory upon which this case was tried by the plaintiff is, that no transfer of the right to use water for irrigation can be made, or the place of such use changed, to the injury of junior appropriators. While in the pleading it might be inferred that reliance was had upon an abandonment, there is nothing in the evidence to show any subsequent appropriation by plaintiff of the abandoned right, even if such had resulted. With much of plaintiff's argument no fault can be found, and, if the proof sustained the allegations of its pleadings, the relief prayed for should be awarded.

The undisputed facts are that the "Jackson" ditch has a decreed appropriation under its first two priorities of twenty-six and one-twelfth cubic feet, antedating any appropriation of the plaintiff's ditch, called Greeley Canal No. 2, whose first two priorities of two hundred and eighty cubic feet are junior to either of the defendant's. The owners of the Jackson ditch and its priorities owned them as tenants in common, and were consumers of the water thereby carried, and they organized a corporation called the Dry Creek Ditch Company, what is commonly known as a "Mutual Ditch Company," to which they conveyed the ditch and the water rights, the company issuing to the several owners capital stock representing ownership in the ditch and the quantity of water which they were entitled to use.

There were twenty-four shares of stock issued. Of these the defendant company, long after the water had been beneficially used, bought three and one-fourth shares from Terry, Black, and Alford, water consumers under the Jackson ditch, and stored

the water thereby represented in its reservoir, and thence distributed it during the later irrigation season to its stockholders, who used it for irrigating lands belonging to them and lying under their ditch. It will be seen that the water was thus severed from the land on which it ¹⁴⁷ was originally used, and applied for the purpose of irrigating other lands. The plaintiff charges that no priority was sold by the sale of ditch stock, and, if it was, then such transfer and change of use have resulted in an enlarged use of water to plaintiff's injury.

In the first place, it is said that the Jackson ditch, its capital stock, and priority to the use of water thereby carried, are three separate and distinct things; the ditch belonging to the corporation, the priority to the water consumers, while the stock may be held by persons not using water. Upon this, as a premise, the argument is that the corporation cannot transfer a priority, only the water consumer may do this. The sale of ditch stock is not the sale of a priority. To transfer this the water consumer must also sell the land upon which the water has been used, or, if he retains the land and sells the water right to be applied on other lands, such right passes to the grantee, and the grantor no longer can irrigate the land retained by means of the water right thus conveyed to another. The conclusion drawn is that in the sale of ditch stock to this defendant no priority passed, and reliance is had on *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275.

The premise, as laid down, may be true in whole or in part, or it may be entirely false. A ditch company organized merely as a carrier of water to those owning the appropriation may, as a corporation, own the physical or tangible ditch. Its stock may be in the hands of A and B, and the consumers of water may be C and D, and the transfer of the capital stock of the company may carry only an interest in the ditch. But where, as is the case at bar, the water rights, and the ditch through which they are enjoyed, are owned by the same persons as tenants in common, and for their mutual convenience they organize a corporation and convey to it the ditch and water rights, and the corporation issues to the consumers its capital stock, which represents and stands for, not only the rights of the parties in the ditch, but, by a mutual arrangement, also represents the right to the use of water, or the priority right, then this stock (while not, of course, constituting ¹⁴⁸ the ditch or priority to the use of water) does represent both the ditch and that priority, and a transfer of the stock operates as a transfer of both kinds of property. So

that all of the plaintiff's argument that nothing was transferred by the purchase from water consumers of the capital stock of the ditch company, and all the distinctions sought to be drawn between ditch stock, the ditch, and the priority to the use of water, are wholly inapplicable to the facts of this case. There is nothing decided in the Combs case that is against this conclusion, and the facts of that case called for no ruling upon the question here raised.

Notwithstanding the decision of this court in Strickler v. City of Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, that there may be a sale of the water right, separate from the land, and an application of the water to other lands, so long as the rights of others are not infringed, plaintiff persists in the contention that its conclusion is unsound. Much of the argument might be pertinent were the doctrine of that case an open question, but not only in this state but in all others in which the system of appropriation prevails, the same result has been reached where the question has been raised. With the conclusion reached in that case we are content: See, also, Fabian v. Collins, 2 Mont. 510, and Frank v. Hicks, 4 Wyo. 502.

The only question of importance, then, in this record is, Have the transfer of the priority and the change of the place of use injuriously affected the later appropriator? If not, plaintiff may not be heard to complain; if so, it is entitled to relief. The finding of the trial court was that as to the one and three-fourths shares of stock bought of Black and Terry, who were stockholders and consumers of water under the Jackson ditch, the transfer has not resulted in any injury to the plaintiff; but, that as to the two shares bought of Alford, such transfer and subsequent use by defendant have resulted in an enlarged use of water above that made by the consumers under the Jackson ditch prior to the transfer.

As to the former part of the ruling, in which the court of 149 appeals concurs, we think the district court clearly right, and this disposes of the cross-errors assigned by the plaintiff.

With much force the plaintiff attacks the decision of the court of appeals reversing the second part of the finding, and strenuously insists that the evidence abundantly sustains the finding of the trial court as to the Alford stock. To a consideration of this proposition we now address ourselves.

In the opinion and findings of the learned district judge it is said that the water represented by the Alford stock had not been used for some time previous to its transfer—at least, to

the extent that it has since been used; that no lands lying under the canal of the company whose stock was sold had ceased to be irrigated, and that the demands upon the supply of water in the river were greater and were increased by reason of the transfer and the enlarged use of water therefrom. If the evidence sustains this finding, or if there is any legal and competent evidence upon which it can be justified, although there is a serious conflict in the evidence, and, in our view, its weight is against the finding, it ought to be upheld under the general rule of this court so often announced.

Considering the important principle involved, the property interests of the litigants, and the respect due to findings of a trial court, we have closely scrutinized the evidence upon this point. The conclusion reached that the plaintiff was injured seems to have been predicated upon two separate facts: 1. That the water represented by the Alford shares had not, for some time previous to the transfer, been used, at least, to the same extent as it was thereafter; and 2. That after the transfer no lands ceased to be irrigated under the Jackson ditch; therefore, the demands upon the supply of water from the river were greater, and have been increased by reason of the transfer.

The uncontroverted facts are that prior to 1880, when Alford bought the stock, the water had all been continuously used in irrigating land of its then owners. When he bought, his intention was to use a portion of the water on school lands, but, being unable to lease them, such use was never had.¹⁵⁰ Therefore, after his purchase and up to the time he sold to the defendant, all this water was used, sometimes in irrigating land that he himself owned lying under the Jackson ditch, sometimes by his tenants, or by those who worked or paid the assessments levied upon the stock; and, when not so used, through a mutual arrangement was employed by the other stockholders in irrigating their lands under the Jackson ditch. Alford testifies that he never intended to abandon his rights, and never did, and that there was no interruption in the use of the water as aforesaid. The evidence is uncontroverted that, in times of scarcity, there was not enough water in the Jackson ditch to irrigate all the lands of the stockholders lying under it, but that its decreed priority, to its full extent, and at all times when available, had been used by the several owners, and when one did not, for any reason, need all his pro rata share, the other tenants in common beneficially applied what was not so needed.

It is to be observed that, under these adjudications awarding priorities, the decreed priority attaches to the ditch, and a certain quantity of water is decreed to it, and no attempt is made to designate the person or persons who are the owners of the priority, or what proportion belongs to each; and, indeed, the statute contains no warrant for determining the ownership of the ditch or the relative rights of the water consumers thereunder. In so far as concerns the rights of junior appropriators who were parties to the proceeding, the quantity of water awarded to the Jackson ditch is *res adjudicata*. Its owners might, and in this case did, apportion the water among themselves: *White v. Farmers' Highline etc. Co.*, 22 Colo. 191. They could not waste it, or divert more than their necessities required; but, junior appropriators are not concerned with the method of apportionment adopted by those entitled to its use, so long as the latter had a necessity for it, and actually used it, and diverted no more than the decreed priority. If one consumer did not need, or use, all that his stock entitled him to, or if, by sale of a portion of his lands, his necessity was less, or, as expressed by counsel, if he ¹⁵¹ owned more water than land, he might lawfully sell the excess of water, or lease it, or permit his cotenants to use it, before any subsequent appropriation attached thereto, and of this junior appropriators may not complain.

One tenant in common may preserve the entire estate held in common. This doctrine is applicable where the common estate is a water right, so long as the tenant in common has both the necessity for the use, and actually uses the water for a beneficial purpose. The extent to which the right may be preserved, of course, depends upon the amount so used, coupled with the necessity: *Meagher v. Hardenbrook*, 11 Mont. 385.

Under the conceded facts, the use of the water represented by the Alford stock, previous to the transfer to the defendant, was such as that no abandonment or loss of the right occurred. The fact that it was not at all times, and to its full extent, used by Alford himself, but that it was at such times used by lessees, or by his tenants in common, preserved intact the right to the full quantity represented by the shares held by him.

But the finding, in form a finding of fact, is that this transfer has resulted in an "enlarged" use. There is not a word of direct evidence that more water is now turned into the Jackson ditch from the river than before the transfer. We

have seen that its decreed priority attaches to the ditch itself, and that if the quantity decreed is beneficially applied, it is immaterial to plaintiff, as a junior appropriator, whether it is upon the lands of the several owners in exactly their pro rata shares, or in accordance with some other method mutually satisfactory.

But the court seems to have concluded that an "enlarged" use necessarily resulted from the mere fact that practically the same number of acres of land lying under the Jackson ditch are now irrigated as before the transfer, and, in addition to this, the defendant with the purchased water right irrigates a large tract of land, how much the evidence fails to show. In other words, the court below, assuming it as a necessary ¹⁵² deduction from the fact that more land was irrigated after, than before, the transfer, held that thereby there was an enlarged use. An "enlarged" use may mean that more land is being irrigated with the same quantity of water than formerly was employed in irrigating fewer acres. It does not necessarily imply that a greater volume is required. It seems to us that if, as a matter of fact, a greater quantity of water is actually so used, the best evidence would be testimony that more water was now being diverted into the ditch. Certainly, evidence that more water is now turned into the headgate of the Jackson ditch would be more satisfactory proof of injury to plaintiff than the inference to be drawn from the mere fact that more land was being irrigated. Suppose there had been no transfer of this stock, and the original stockholders had increased their acreage, would plaintiff necessarily, or at all, be injured if the aggregate quantity of water diverted into the Jackson ditch was no greater than before cultivating the additional land? Might not the same quantity be used, through more economical methods of spreading the water, or possibly by not so complete saturation? Suppose, again, that defendant had bought all the rights of priority attaching to the Jackson ditch, could it not change the place of use, and even apply the water to a thousand acres more land than the former owners irrigated, provided no greater amount of water was taken from the river than before the transfer? The only specific evidence is that no more water is now being diverted than before, and that is by no means overcome by an inference of enlarged use drawn from an increased acreage. In other words, the finding by the court that there was an enlarged use is not only not one of fact, but an unwarrantable conclusion or deduction from

facts which are attended by no such consequences. To say the least, in the absence from this record of evidence as to other essential elements entering into the problem, it is impossible to determine from the evidence before the court that a greater quantity of water is now diverted through the Jackson ditch to irrigate the lands of the present stockholders than ¹⁵³ was taken before the defendant acquired its stock; and, if only the same quantity is diverted, plaintiff suffers no injury.

There is no other evidence than this relating to the nonuse of water by Alford himself, and as to the acreage now and heretofore irrigated, to show a larger diversion of water. True, in answer to hypothetical questions (not proper questions, because based in part upon no evidence in the case) certain opinions in the nature of legal conclusions were given by several witnesses to the effect that plaintiff was injured by the transfer, but we are to determine this from the facts, and not from opinions of witnesses. In any event, the evidence signally fails to show that since the transfer the Jackson ditch has diverted more than its decreed priority, or more than it did before the transfer, or that any greater demand upon the waters of the stream is made by the defendant than was previously made by Alford and his cotenants.

From the foregoing our conclusion is that the finding below that plaintiff has been injured has no substantial foundation in the facts of this case. The nonuse by Alford of all the water he was entitled to, when it is considered that he had no intention to waive any right, and that he and his cotenants did use all the water his shares represented, worked no abandonment of his rights. The mere fact that, since the transfer, a greater acreage has been irrigated by the decreed priority of the Jackson ditch than before does not establish a greater diversion. Greater economy in use, or less thorough irrigation, or difference in soil as to absorbing quality, may account for that; especially when there is no direct evidence at all that more water has been diverted from the river into this ditch, and there is positive evidence that no greater volume has been diverted since the change of place of use. The evidence as to increased acreage is not, of itself, sufficient to establish that an enlarged use of water has been occasioned by the transfer.

The judgment of the court of appeals is affirmed, with instructions to remand the case with directions to the district court to affirm its judgment as to the Black and Terry stock,

¹⁵⁴ and to reverse it as to the Alford shares, and, if further proceedings be had, that they conform to this opinion.

PRIORITIES IN WATER RIGHTS.—Appropriators of water from the same stream, through the same ditch, may have different priorities of right to the use of such water, based upon the time of the several appropriations: *Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149. A prior appropriator of water from the main stream is not subject to subsequent appropriation from its tributaries by others: *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, and note. A prior appropriator of water from a stream may change the point of diversion and the place of use, without affecting his right of priority, so long as the rights of others are not thereby injuriously affected: *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, and note. See the extended notes to *Heath v. Williams*, 43 Am. Dec. 269.

SALE OF WATER RIGHTS.—The prior appropriator's right to the use of the water of a stream is a property right which he may transfer by sale, unconnected with the land, so long as the rights of others are not injuriously affected thereby: *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, and note.

CACHE LA POUDRE RESERVOIR COMPANY v. WATER SUPPLY & STORAGE COMPANY.

[25 COLORADO, 161.]

WATERS AND WATERCOURSES.—APPROPRIATION of water can only be made by an actual diversion, followed by an application thereof, within a reasonable time, to a beneficial use.

WATERS AND WATERCOURSES.—APPROPRIATION—TIME OF USE.—One person may make a prior appropriation of a certain quantity of water to be enjoyed for a designated period of time or part of the year, and another person an appropriation of a like quantity from the same source during another period or part of the year, and, as to the latter, be a prior appropriator himself.

WATERS AND WATERCOURSES.—APPROPRIATION—CHANGE OF USE.—If water is appropriated for mill power purposes, and, after its use, permitted to flow undiminished back into the natural stream, it is then subject to another appropriation, and, when appropriated, the mill owner or his grantee cannot change the character of its use or place of diversion, to the injury of the appropriator below the mill.

WATERS AND WATERCOURSES.—APPROPRIATION—CHANGE OF USE.—PRIORITIES.—If water has been appropriated for mill power purposes, and, after such use, returned to the stream in undiminished quantity, and then appropriated by a lower proprietor for irrigation purposes, the latter acquires a prior right to the use of the water, which cannot be defeated by an abandonment of the mill appropriation in favor of, or by transfer to, an appropriator above the mill, whose appropriation for irrigation purposes is prior to the appropriator below the mill, but subsequent to the appropriation by the mill owner.

V. A. Elliott and H. N. Haynes, for the appellant.

Rogers & Shafroth, J. E. Garrigues, and C. H. Vidal, for the appellees.

162 CAMPBELL, C. J. The appellant here was plaintiff, and the appellees were defendants, below. For the sake of brevity and convenience, in the opinion the appellant is designated as the plaintiff, and the defendant Water Supply and Storage Company as the "water company," and the Colorado Milling and Elevator Company as the "milling company." The ultimate and substantial facts alleged in the voluminous complaint are, in the main, fairly summarized by defendants' counsel in their brief as follows:

In 1868, the defendant milling company constructed a ditch diverting from the Cache la Poudre river sixty cubic feet of water per second of time to be used in propelling its mill **163** machinery, and then, undiminished in quantity and unimpaired in quality, discharged the same into the river. Such use the milling company has made of the water continuously from that time to the present, both winter and summer, nights and days, excepting only when, for some cause, the mill was not in actual operation.

In 1881, the defendant water company constructed a ditch taking water directly from the river at a point above the headgate of the milling company's ditch, and the uses actually made of such appropriation were the irrigating of agricultural lands during the summer season, and the storing of water, outside of the winter months, in certain of its reservoirs, having an aggregate storage capacity of five hundred million cubic feet, and then using it in the latter part of the season for irrigating lands belonging to its stockholders.

In 1892, the plaintiff reservoir company constructed a ditch taking water from the river at a point below the discharge of the milling company's ditch, and the object of this appropriation was to store the water in its reservoir, having a storage capacity of four hundred and fifty million cubic feet, to be used during the late irrigation season for irrigation purposes.

There are sixty-five ditches which rightfully divert and take for irrigation all of the water which flows in the river during the irrigating season, except during the period of floods in the month of June, when there is some water available for storage. Between November 1st and April 1st of each year, prior to the winter of 1892-93, the amount of water which was accustomed to flow in the river down to the place where now is located plaintiff's headgate was about sixty cubic feet per second, sometimes more, sometimes less. During this winter the sixty cubic feet of water diverted and used by the milling company

for propelling its machinery and afterward discharged into the river flowed down and was taken into the headgate of the plaintiff company's ditch, where it was by it diverted and stored in its reservoir.

Beginning with the winter of 1893-94, and continuing during the following winter, the defendant water company diverted ¹⁶⁴ the waters of the stream on Sundays and at such other times as the mill of the defendant milling company was not in actual operation, and thereby intercepted the flow of said sixty feet, which during the winter of 1892-93, and therefore ran continuously and without diminution to the place where now is the headgate of the plaintiff company, and caused this flow to become intermittent, running only at such times as the mill was in actual operation, and then not in the quantity theretofore flowing, on account of the mill race becoming clogged with ice caused by defendant's wrongful diversion. The defendant water company now refuses to recognize that the plaintiff reservoir company has any right to divert waters from the river for storage between the 1st of November and the 1st of April to the extent of sixty feet, or to any extent senior to the right claimed by it to divert waters during the same period for storage in its reservoir; and it claims the right to induce the milling company, for a consideration (and proposes and threatens to accomplish that end), to keep idle its mill during all or a part of the winter months, or to cease its operation by water power, in order that, during such time, the water company may divert water for storage. In other words that, by collusion, these two defendants threaten to bring about an abandonment by the milling company of its right to use its appropriation of water for power purposes; and thus seek, indirectly, to confer upon the defendant water company the opportunity and assumed right to take it out and absorb it at a different place, and for a different purpose, to the injury of plaintiff.

It should be borne in mind that it is distinctly alleged in the complaint that, prior to the winter of 1893-94, and not until after the plaintiff company had made its appropriation, the defendant water company had never diverted in the winter time any water whatever from the river, to the extent of sixty cubic feet, or any other quantity, either during nights, Sundays, or at intervals when the mill was not in actual operation, although such temporary nonuse for power purposes had frequently occurred; and that not until after the plaintiff

¹⁶⁵ had, as just stated, made its appropriation of all the winter flow of the river, including the water discharged from the mill race into the river after having been used to operate the mill, did the defendant water company begin its diversion. This diversion thus for the first time begun by the defendant water company, according to the allegations of the complaint, has prevented the plaintiff company from getting into its reservoir during the winter season the waters it is entitled to, and the defendant water company threatens to continue its diversion to the detriment of the plaintiff.

The milling company suffered a default, and the other defendants filed a demurrer to the complaint containing several grounds, but the only one argued by counsel on this appeal is, that the complaint does not state facts sufficient to constitute a cause of action, and to this our consideration is confined.

From the foregoing statement it clearly appears that after the use and subsequent discharge into the stream of the sixty cubic feet of water diverted by the milling company, the first beneficial use thereof, as well as of other so-called winter waters, was made by the plaintiff; and that no attempt was made by the water company to cause any waters to flow in its ditch until a year after the plaintiff had actually stored water in its reservoir.

Neither party questions the first priority of the milling company, so that question is eliminated. The case may first be considered as though all allegations concerning the mill ditch were absent, though this method will occasion some repetition.

To sustain its claim to the first appropriation of the winter waters of the stream, counsel for the water company makes a plausible and ingenious argument. It is this: When, in 1881, it conceived its plan for diverting water for irrigation and storage, it was confronted with senior demands existing against the flow of the river for irrigation and milling purposes. Whether these demands were satisfied by means of ditches above or below its intake, defendant was obliged to ¹⁶⁶ respect them irrespective of the character of the use. Though these prior demands absorbed all the waters of the river, yet the quantity actually needed was not at all times equal to its actual volume. Therefore, if there were occasions when all or a portion of the waters were not used, the defendant, for such periods, could acquire a right to divert and enjoy

what was not used by senior appropriators. That is to say, although the rights of these senior appropriators, when fully exercised, would consume the entire flow, yet they may not waste water, and, when they did not need all, or any portion, a junior appropriator might, at such times, use such unused waters, and as to the same would become a prior appropriator himself. Or, as expressed in the exact language of counsel: "The moment that a claim to water ceases to be exercised, partially or totally, the water in the river from the source to its mouth is relieved to that extent of any legal right in the claimant, and it is, as to succeeding claimants, unappropriated water."

For the purposes of this case, we may concede the validity of the argument up to this point, and further concede that this statement defines the status of the defendant company with respect to senior appropriators; and that, when they ceased to use water, it became subject to appropriation. Therefore, as the argument proceeds, the defendant might acquire a right to divert such unused waters, either for irrigation or for storage. Indeed, we might go further, and say that it may have perfected its right thus to take water during the summer season. But the argument stops short here, probably for the reason that the facts of this case require it. For, if the water company did not make such an appropriation to be enjoyed during the winter season (which is directly negatived by the complaint) until after the plaintiff made its appropriation, and limited to that season, the latter, as to the volume of water actually appropriated by it, becomes the senior appropriator as to the winter flow.

Applying the foregoing principles to the admitted facts of this case, it appears that, as to sixty cubic feet of water, the ¹⁶⁷ plaintiff first appropriated it for storage purposes during the winter season. While the ditch and reservoir of the water company were first built, and its facilities for storing winter waters antedated those of the plaintiff, the former did not, as a matter of fact, store, or attempt to divert for storage, any water of the river between November and April of any year until after the plaintiff made its appropriation for that period during the winter of 1892-93. For aught we know, the water company may have a superior right to store waters during other seasons of the year, but, by its demurrer, it admits that the plaintiff made the first appropriation for the winter season.

No right is acquired by merely possessing facilities for making an appropriation, unaccompanied by a bona fide attempt within a reasonable time to utilize them. Under our law, an appropriation can be made only by an actual diversion of water, followed by an application thereof, within a reasonable time, to a beneficial use. The fact, therefore, that the defendant water company, from 1882 to 1892, and during the winter seasons of these years, neither diverted water nor beneficially applied it until after the plaintiff made its diversion in 1892, makes the former the junior appropriator, and the latter the senior, for such periods of time, as to the quantity actually appropriated by the latter.

While no case in this court may have required the announcement, it seems, both upon principle and authority, that one may make a prior appropriation of a certain quantity of water to be enjoyed for a designated period of time, and another person an appropriation of a like quantity from the same source during another period, and as to the same be a prior appropriator himself. In other words, there is no difference in principle between "an appropriation measured by quantity and an appropriation measured by time": Kinney on Irrigation, sec. 177, et seq., and cases cited; Black's Pomeroy on Water Rights, secs. 69, 91, 92, and cases cited; Barnes v. Sabron, 10 Nev. 217; Smith v. O'Hara, 43 Cal. 371, and cases cited.

¹⁶⁸ But we apprehend that the principal object of the action was to obtain an adjudication of the conflicting claims of the plaintiff reservoir company and the defendant water company to the milling company's appropriation at such times as the latter temporarily ceased to use the same, or, in the event that it wholly ceased to use, with no intention of reclaiming, its right. Considering the case, then, as it is made in the complaint, with the element of the mill race present, let us see if that makes any difference in the principle just announced. Of the three headgates, that of the water company is highest up the stream, and that of the plaintiff the lowest, while the intake of the mill race is between the two. For twenty-four years sixty cubic feet of water per second of time had been continuously flowing into the mill race, and for ten years the water company had permitted it to pass by its headgate, recognizing the prior right of the milling company thereto; and during these years, even when the milling company ceased temporarily to use it in operating the mill (as it frequently did for short

periods of time), the water company, during the winter season, did not attempt to make any use of the milling company's appropriation.

After this volume of water fulfilled its mission of running the mill machinery, it was turned back into the natural channel, and such have been the extent and method of use by the milling company since the day of its appropriation. In effect, the milling company thereby gave notice to the public that its only use of this water was for power purposes, and when that function was performed, its claims terminated, and such, indeed, is the only claim it now makes. After the water had again reached the natural channel, the plaintiff had the right to appropriate it directly from the stream, and such right is entitled to protection under the law. When the milling company ceased to use this water, the water company has no prior right over the plaintiff, for the latter first appropriated it. That the water company wanted to use it, or was prepared to use it, if he could get it, but did not until ¹⁸⁹ after the plaintiff appropriated it, is no reason why the latter's right should be subordinated to those of the former.

Now, it is further manifest that after the plaintiff made its appropriation, while the milling company may change the character of its use, or the place of diversion, it may not do so to the injury of the former: *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245. Neither could it, by sale to the water company or other person, empower its grantee to do what it could not do. But, say counsel, plaintiff may not compel the milling company to divert water into its race for the former's benefit, and therefore the latter may cease altogether to use its mill race. True, but is this equivalent to holding that it may, by abandonment, confer, or that it may make such other use of its appropriation as to confer, upon others a right to deprive the plaintiff of its appropriation?

This leads to a consideration of the second general contention of defendants, that when the milling company ceases temporarily, or, as in case of abandonment, permanently, to exercise its rights, the water theretofore diverted must be allowed to flow in the stream subject to appropriation by other appropriators higher up the stream, in accordance with their relative priorities, irrespective of the question whether or not the unused or abandoned waters have been appropriated by ditch owners farther down the stream before the date of such temporary or permanent nonuse.

It is somewhat singular in this case that opposing counsel rely upon the same authorities, which are cited in all the briefs, though not so strange that they disagree in their conclusions drawn therefrom, or as to the legal effect of an abandonment. The position of defendants is that, when an abandonment occurs, the situation is as though no appropriation had ever been made; and, at the very moment an abandonment occurs, the water resumes its original quality of being a part of the public waters, and may be taken by other appropriators in the order of their original dates of priority.

It has been determined, where an appropriation of water for a use that wholly absorbs it, as for irrigation, is abandoned ¹⁷⁰ and allowed to flow into the stream above the headgates of all the ditches, or when the stream, from whatever cause, has at such point received an increase in volume, the right to the use of the increased quantity is in accordance with the priorities of the several ditches: Kinney on Irrigation, secs. 183, 259. We are not called upon to declare how abandoned water in all cases should be distributed, but we are to lay down the rule to govern in a case like the one at bar, and where the use is a nonabsorbing one. So long as the milling company was using, and then discharging into the stream, the water whose benefits it had enjoyed, this returned water was, as to the milling company, abandoned water; that is, it had used it for a certain purpose, and thereafter made no further claim to it. But ditch owners above, owing to a physical law, could not then claim it. It then became subject to appropriation; and when once it was appropriated by a ditch owner below the place of discharge, ditch owners higher up the stream are not entitled to it, either during temporary nonuse, or after abandonment, though their priorities as to other quantities of water, or for other seasons of the year, may be prior in time. The lower ditch owner, in other words, is himself the prior appropriator of this so-called abandoned water. To hold otherwise would be to take away from a ditch owner below who had made an actual beneficial use of water something which he theretofore used, and give to another higher up the stream that something which the latter theretofore never had enjoyed, or had the opportunity or right to enjoy.

It follows, therefore, when the plaintiff went upon the stream and saw the use that was being made of water by the milling company, and then made its appropriation, no subsequent act of omission or commission by the milling company

could operate to the injury of the plaintiff; and, by virtue of its appropriation, the plaintiff, on the basis of then existing conditions, secured a vested right to have the water continue to flow either from the mill race or from the stream itself, in substantially the same quantity as it flowed when ¹⁷¹ its appropriation was made. The plaintiff, though junior to the milling company, in so far as the use of the water for power purposes is concerned, is a senior appropriator to the milling company as to the water which the former appropriated, after it left the mill race. That right was just as valid as was the prior right of the milling company for power purposes, and each becomes a vested right: *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537; *Ortman v. Dixon*, 13 Cal. 33; *Last Chance etc. Min. Co. v. Bunker Hill etc. Co.*, 49 Fed. Rep. 430; *Kinney on Irrigation*, secs. 234, 253, 254, 259, and cases cited.

This conclusion would seem to be in accordance with equity, and, in principle, well established by the authorities cited. The water company could not, by purchase, acquire from the milling company any superior right to this sixty cubic feet of water appropriated by the plaintiff, for the milling company had no prior rights to convey. Why, if the milling company ceases temporarily or permanently to use its appropriation the water company could, or should, obtain a right which it could not get by purchase, is difficult to perceive, for one may not abandon a right in favor of another.

An illustration used by plaintiff's counsel serves to bring out more clearly this point. Suppose the water company owned all the water rights, both for irrigation and milling, on this stream, and had used them for years, as the present owners have done. Could it, after the plaintiff had made its appropriation, change the character of the use of the mill appropriation, and use the same quantity of water during the winter season for storage in its reservoirs, and thus prevent plaintiff from enjoying its appropriation during the same season? Or could it change the place of diversion by discharging water from the mill race at a point below the plaintiff's headgate in order to store it in some reservoir that it might own farther down the stream? Manifestly not; and, if not, why should a different result follow by any act of the present owners, whether they act in conjunction, or entirely independent of each other?

¹⁷² The judgment should be reversed, and the cause re-

manded, with instructions, if further proceedings be had, that they be in accordance with the views herein expressed.

TO THE VALID APPROPRIATION OF WATER three elements must exist: 1. Intent to appropriate to some beneficial use existing at the time or contemplated in the future; 2. A diversion from the natural channel by means of a ditch, canal, or other structure; 3. The application of it within a reasonable time to some useful industry: *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777.

APPROPRIATION—CHANGE OF USE.—If the appropriation of water has become perfect by the diversion of the water and its application to a useful purpose, the appropriator acquires the right to use the water thus actually appropriated, either for the purpose originally contemplated, or for any other lawful purpose. But an appropriator cannot appropriate surplus water which he has not used, as against intervening appropriators: See the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 813, 814. A construction of a grant of water power that will restrict the grantee to the specific use to which the water was applied when the grant was made will never be adopted, unless the language of the grant unmistakably shows that such was the intention of the parties: *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772.

BENT OTERO IMPROVEMENT COMPANY v. WHITEHEAD.

[25 COLORADO, 354.]

TRUSTEE'S SALES—REQUEST OF BENEFICIARY—CONDITION PRECEDENT.—If the power of sale in a deed of trust is conditioned upon the request of the beneficiary, such request is a condition precedent to the power to sell in the absence of circumstances from which such request may be inferred.

TRUSTEE'S SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies to trustee's sales, and a purchaser at such sale is bound to take notice that all the conditions upon which the trustee's power to act depends have been complied with.

TRUSTEE'S SALES—CAVEAT EMPTOR RECITALS IN DEED—BURDEN OF PROOF.—A provision in a deed of trust that in case of sale the recitals in the trustee's deed should be taken as prima facie evidence of the facts therein stated does not relieve the purchaser of the rule of caveat emptor, and, at most, only casts upon the party assailing the deed the burden of proof to overcome such presumption.

DEPOSITIONS.—OBJECTIONS TO DEPOSITIONS must be made and disposed of before trial.

TRUSTEE'S SALES—SETTING ASIDE—EVIDENCE.—A protested draft issued by a trustee to the holder of a note secured by trust deed, and tendered as interest on such note two months after sale of the trust property by the trustee, is admissible in evidence in an action to set aside such sale on the ground that it was unauthorized and void, as tending to show a purpose on the part of the trustee to conceal from the holder of the note the fact of an attempted foreclosure of the trust deed, and also as confirmatory of his statement that he had no knowledge of such attempt until put on inquiry by the protested draft.

Cranston, Pitkin & Moore, for the appellant.

Kilgore & Hess, and M. Whitehead, for the appellee.

355 GODDARD, J. The appellee, Matthew Whitehead, being the owner of a note secured by a certain deed of trust, brings this action to cancel a trustee's deed issued to appellant in pursuance of a sale of the trust property, upon the ground that the sale was unauthorized and void. He predicates his right to such relief upon the following facts:

One Ruel L. Nute, on September 21, 1889, made a promissory note for one thousand dollars, payable to the order of the Colorado Securities Company on September 1, 1894. At the same time, to secure the payment of the note, he executed a deed of trust to Henry J. Aldrich, the president of the company, conveying to him, as trustee, three hundred and twenty acres of land situate in Otero county, Colorado. This trust deed was in the usual form, and contained, inter alia, the following provision: "That in case of default in the payment of said note, or any part thereof, with the interest thereon at the time, and in the manner, and at the place specified for the payment thereof, . . . then and in such case, on the application of the legal holder of said note, it shall, and may be, lawful for the said party of the second part . . . after having advertised such sale thirty days in a newspaper . . . to sell said premises **356** . . . and to execute and deliver to the purchaser or purchasers a deed or deeds of conveyance in fee of the premises sold by virtue hereof. And it is agreed that the recitals in said deed shall be taken and accepted as prima facie evidence of the facts therein stated."

About October 1, 1889, the appellee, through his brother, William H. Whitehead, purchased this note at its face value, which, together with the deed of trust, was delivered to him at that time, and is still the owner and holder of the same; that no part of the principal of the note, and no interest after its maturity, had been paid. On December 7, 1894, Henry J. Aldrich, the trustee, advertised the land for sale in the manner provided for by the trust deed; and on January 7, 1895, on the day appointed in the advertisement, sold the same to appellant, the Bent-Otero Improvement Company, it being the highest and best bidder, for the sum of three thousand dollars cash; and on the same day executed and delivered to the company the trustee's deed above mentioned. The Colorado Securities Company, as guarantor of the note, paid the interest as it fell due, by drafts drawn by Aldrich, its president, on the Importers and Traders National Bank of New York City; and it appears that appellee, by reason of the nonpayment and pro-

test of a draft so drawn for the amount of interest due on the note March 1, 1895, was put upon inquiry, and therefrom first learned of the attempted foreclosure of his deed of trust.

It is further shown, by the uncontradicted testimony of appellee, that this sale was made without his request, knowledge, or consent, and that he never received any of the proceeds of the sale.

The appellant, among other matters of defense, avers "that the plaintiff ought not to be admitted to say that he did not order and request the foreclosure of the deed of trust mentioned in his complaint, . . . because . . . the plaintiff . . . permitted the Colorado Securities Company and Henry J. Aldrich . . . to deal with said note and security as general agents." But the court below disposed of this plea by finding that, as a matter of fact, there was no evidence ³⁵⁷ whatever to support it. An examination of the evidence, as disclosed by the record, satisfies us that the court was correct in its conclusions.

The record discloses that the cause was set for trial on November 22, 1895; and when the case was called both parties appeared and announced themselves ready for trial. Then, for the first time, counsel for defendant objected to the reading of the deposition of Matthew Whitehead, "on the ground that the certificate of the notary public was not according to law," and without specifying in what particular the certificate was defective in this regard. The court overruled the objection and allowed the deposition to be read. Objection was also made to the introduction in evidence of the protested draft above referred to. Aside from these objections, the assignments of error present but one question, and that is whether a trustee named in a deed of trust, wherein the power of sale is conditioned upon the request of the beneficiary, can sell the land and convey to the purchaser a good title without such request, or without any circumstance from which the purchaser could infer such request on his part. The powers of a trustee depend entirely upon the terms of the instrument appointing him, and no power is conferred unless expressed in the writing. Such request, therefore, becomes a condition precedent to his power to sell; and since the rule of caveat emptor applies to trustee's sales, the purchaser is bound to take notice that all matters in pais upon the existence of which the trustee's power to act depends have been complied with. This is clear under all the authorities, among them the following: Stephens v.

Clay, 17 Colo. 489, 31 Am. St. Rep. 328; Shippen v. Whittier, 117 Ill. 282; Williams v. Peyton, 4 Wheat. 77; Magee v. Burch, 108 Mo. 336; Bomar v. West, 87 Tex. 299; Kenney v. Jefferson Co. Bank (Colo App. Sept. 12, 1898), 54 Pac. Rep. 404; Breit v. Yeaton, 101 Ill. 242; Equitable Trust Co. v. Fisher, 106 Ill. 189; 2 Perry on Trusts, 4th ed., secs. 602 g, 784.

In Shippen v. Whittier, 117 Ill. 282, it is said: "The rule is familiar, and strictly applicable here, that a ³⁵⁸ purchaser under a power purchases at the peril of the sale being void if a material condition precedent to the exercise of the power does not exist. A sale without the existence of such material condition precedent is a sale not authorized by the power, and no title can pass by it."

In Williams v. Peyton, 4 Wheat. 77, Chief Justice Marshall, speaking for the court, said: "It is a general principle that the party who sets up a title must furnish the evidence necessary to support it. If the validity of the deed depends on an act in pais, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title."

In Perry on Trusts, paragraph 602 g, the learned author, speaking to this point, says: "The purchaser is bound to know the full particulars and purpose of the power under which he purchases; and if he makes any mistake in the construction of the power, or if he does not fully inform himself and acts in ignorance, he will take no title if the power is not properly executed."

In Kenney v. Jefferson County Bank (Colo. App. Sept. 12, 1898), a case recently decided by our court of appeals, the rule is thus concisely stated: "It is undoubtedly true, and in this all the authorities agree, that a trustee by written instrument is clothed with no powers save those which are expressed in the writing, and if his authority to act is in any wise, or at all, dependent upon matters in pais, the parties dealing with the trustee are bound in the one case to see that the authority is expressly given by the instrument and in the other that those facts exist which authorize the trustee to act."

Counsel for appellant concedes that the rule of caveat emp-

tor ³⁵⁹ applies to purchasers at trustees' sales under ordinary trust deeds, but insists that the rule cannot be invoked in this case because in the trust deed under which appellee claims it is provided "that the recitals in said deed shall be taken and accepted as prima facie evidence of the facts therein stated"; and in support of this claim relies upon the case of *Jesson v. Texas Land etc. Co.*, 3 Tex. Civ. App. 25, and *Carey v. Brown*, 62 Cal. 373. These cases fall far short of supporting counsel's contention. The provisions in the trust deeds there under consideration were different from the provision in the trust deed in this case. In the one it was provided that recitals in the trustee's deed should be conclusive; and in the other, that they should be full evidence of the truth of the matter therein stated; while in the one before us it is provided that the recital shall be prima facie merely, which at most would cast upon the party assailing the deed the burden of producing evidence sufficient to overcome this prima facie presumption; which was clearly done, as we have seen, by the uncontradicted evidence of appellee.

We think it is clear, under the established facts in this case, and the doctrine laid down by the uniform current of authority, that the action of the trustee in making the sale of the trust property was unwarranted, and appellant acquired no title thereunder; and that the appellee is entitled to the relief granted by the court below.

Whether the objection to the deposition would have been tenable, if made in apt time, we need not determine. Section 353 of the code provides that "all objections, exceptions, and motions in respect to depositions shall be made and disposed of before trial; provided, that objections to competency, relevancy, or materiality of testimony therein may be reserved and ruled on during the trial."

Under this provision it is clear that the objection came too late to be entertained by the court, and was properly overruled; nor can we see wherein the court committed any error in admitting the protested draft in evidence. Its issuance, two months after the attempted sale, was a circumstance that ³⁶⁰ tended to show a purpose on the part of the trustee to conceal from appellee the fact of the attempted foreclosure of the deed of trust, and is confirmatory of his statement that he had no knowledge until put upon inquiry thereby that the sale had been made. It follows from the views we have expressed that

the judgment of the court below is correct, and must be affirmed, which is accordingly done.

TRUSTEE'S SALES.—A power of sale contained in a trust deed must be strictly followed to render its exercise valid: *Schanewerk v. Hoberecht*, 117 Mo. 22, 38 Am. St. Rep. 631. A court may be empowered by statute to decree a sale when property is held in trust, and one or more persons required to consent unreasonably withhold consent, and such a statute is not unconstitutional as taking property without due process of law: *Freeman's Estate*, 181 Pa. St. 405, 59 Am. St. Rep. 659.

TRUSTEE'S SALES—CAVEAT EMPTOR.—With respect to conditions precedent imposed by the creator of a trust, and the happening of which gives rise to a cause of sale, the rule of caveat emptor applies, and the purchaser must therefore ascertain at his peril whether a cause of sale exists or not: *Note to Tyler v. Herring*, 19 Am. St. Rep. 279.

TRUSTEE'S SALES—SETTING ASIDE trustee's sales: See the extended note to *Tyler v. Herring*, 19 Am. St. Rep. 280.

ZANG v. WYANT.

[25 COLORADO, 551.]

APPELLATE PRACTICE—CONSTITUTIONALITY OF STATUTE.—The question as to whether a statute was constitutionally passed cannot be considered for the first time on appeal.

CORPORATIONS—INSOLVENCY — REMEDY—LIABILITY OF STOCKHOLDERS.—A suit in equity by a creditor or creditors for the benefit of all the creditors is the proper remedy to enforce the liability of stockholders in an insolvent corporation for the debts thereof. Neither the assignee nor receiver of an insolvent corporation can maintain such suit unless given the right by statute.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—WHEN MAY BE ENFORCED.—If an insolvent corporation makes an assignment for the benefit of its creditors, they are not required to await the collection and disposition of all doubtful claims and assets of the corporation before bringing action to enforce the stockholders' statutory liability. The stockholders must pay promptly and take upon themselves the onus of delay and risk as to such claims.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—CONSTRUCTION OF STATUTE.—Under a statute imposing upon the stockholders in a corporation a liability for its debts "in double the amount of the par value of the stock owned by them respectively," they are liable in such double amount in addition to their subscription to the stock, no matter whether they have paid or are still indebted therefor. Such liability imposed for the benefit of creditors, is in addition to any liability of the stockholder to the corporation for his subscription for stock.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS FOR INTEREST.—If, from the nature of a contract or debt of an insolvent corporation, interest is allowable against it, that constitutes a part of its indebtedness, for which the stockholders are liable.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—EVIDENCE.—The relation of stockholders to an in-

solvent corporation as stockholders is sufficiently shown by the production in evidence of the stock-book of the corporation and the testimony of its assignee, who had been its cashier, that such book represented the stockholders, was the only book kept for that purpose, that it was kept in the ordinary course of business, and that the persons named therein took part in the stockholders' meetings during the period of time that their names appeared on the book.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—BOOKS AS EVIDENCE.—In an action to enforce the stockholders' statutory liability for the debts of an insolvent corporation, the books of the corporation, kept by its employes in conducting its business, are admissible in evidence.

EVIDENCE—ACCOUNT BOOKS.—In order to render account books admissible in evidence to show admissions against the party making them, it is only necessary that they be shown to be his books, kept in the regular course of business, and that entries therein were made by himself or an agent authorized to make them.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—EVIDENCE TO ESTABLISH.—In an action to enforce the statutory liability of the stockholders of an insolvent banking corporation for its debts, the pass-books issued to depositors are no better evidence than the entries made in the balance-book of the bank from deposit slips made at the time of deposit, and though such entries are made by an officer of the bank, yet in making them he acts as agent for the stockholders and the entries are as binding upon them as upon the bank.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—CERTIFICATES OF DEPOSIT—EVIDENCE.—In an action to enforce the statutory liability of stockholders of an insolvent banking corporation for its debts, upon certificates of deposit negotiable and transferable by indorsement, they must be produced in evidence to show their present ownership, or must be shown by competent evidence to be lost or destroyed, and the necessity for such proof is not dispensed with by showing a list of verified claims presented to the assignee of the corporation and allowed by the court, including the certificates of deposit in question upon which dividends have been ordered paid. Such allowance does not constitute a judgment in personam against the bank or its stockholders, and is at most a judgment in rem fixing the status of the claimant toward the assigned property, and establishing his right to participate in the benefits of the assignment.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—PARTIES.—In an action to enforce the statutory liability of the stockholders of an insolvent banking corporation for its debts, the fact that the bank and its assignee are not made parties defendant does not in any manner affect the rights or liabilities of such stockholders.

PARTIES—WAIVER OF DEFECT IN.—A person, by answering over, after demurrer, on the ground of defect of parties, waives the right to raise that question on appeal.

APPELLATE PRACTICE—ORIGINAL EVIDENCE cannot be treated or considered by the supreme court on appeal.

Equitable action by creditors on behalf of themselves and such other creditors as might join them to enforce the statutory liability of the stockholders in an insolvent banking corporation. Judgment for plaintiffs, and the defendants appealed.

Muller & Weil, L. Weinschenk, Bartels & Blood, S. S. Sherman, T. E. Waters, and J. H. Brown, for the appellants.

P. B. Tolles and T. D. Cobbey, for the appellee.

⁵⁵⁴ GODDARD, J. The specifications of error are voluminous, and, in addition to the questions they raise as to the admissibility and sufficiency of certain testimony, challenge the right of appellees to maintain the action, and also the construction that the court below gave to the statute under which the recovery is sought. In their printed argument, for the first time, counsel question the validity of the act itself, upon the ground that it was never constitutionally passed. Under former decisions of this court and the court of appeals this question is not properly before us for consideration: *Marean v. Stanley*, 21 Colo. 43; *Rice v. Carmichael*, 4 Colo. App. 84.

Counsel for appellants insist that the assignee was alone entitled to maintain the action, and that the creditors themselves cannot invoke the interposition of a court of equity to enforce the liability of stockholders, under this statute. Upon whom the right to enforce the remedy devolves, and the mode of procedure that should be adopted, have been in controversy ⁵⁵⁵ in many of the courts of last resort, and have been variously decided, some holding that the liability is primary, and enforceable in an action at law by an individual creditor against one or more of the stockholders, while in others, and by far the greater number, it is held that the fund created by the statute is in the nature of a security for the common benefit of all the creditors, and that a suit in equity affords the most effectual and convenient remedy for its enforcement; that since the fund is exclusively for the benefit of the creditors, and forms no part of the assets of the corporation, the right of action accrues to the creditors themselves, and, in the absence of a statute conferring the right, neither the assignee nor receiver of an insolvent corporation can maintain the action: *Terry v. Little*, 101 U. S. 216; *Pollard v. Bailey*, 20 Wall. 520; *Horner v. Henning*, 93 U. S. 228; *Farnsworth v. Wood*, 91 N. Y. 308; *Pfohl v. Simpson*, 74 N. Y. 137; *Mathez v. Neidig*, 72 N. Y. 100; *Griffith v. Mangam*, 73 N. Y. 611; *Wincock v. Turpin*, 96 Ill. 135; *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435; *Jacobson v. Allen*, 20 Blatchf. 525; *Minneapolis Paper Co. v. Swinburn etc. Co.*, 66 Minn. 378; *Umsted v. Buskirk*, 17 Ohio St. 113; *Wright v. McCormack*, 17 Ohio St. 86; *Crease v. Babcock*, 10 Met. 525; *Liberty Female etc. Association v.*

Watkins, 70 Mo. 13; *Runner v. Dwiggins*, 147 Ind. 238; *Cook on Stock and Stockholders*, sec. 280; *Thompson on Corporations*, sec. 3560; *Morawetz on Private Corporations*, sec. 869.

In *Terry v. Little*, 101 U. S. 216, Chief Justice Waite, in discussing the procedure that should be adopted for the enforcement of a liability provided in the charter of the Merchants' Bank of South Carolina, in language substantially the same as that used in our statute, said: "Undoubtedly, the object was to furnish additional security to creditors, and to have the payments when made apply to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, it must be enforced by or for all. ⁵⁵⁰ The form of the action, therefore, should be one adapted to the protection of all."

In *Pfohl v. Simpson*, 74 N. Y. 137, it is said: "A suit in equity laying hold of all the stockholders in like category, and promoted for the benefit of all creditors having like interest, is peculiarly adapted to work out exactly just and equitable results. . . . The object and effect is only to bring to one forum the determination of rights which must, if prosecuted separately, more or less conflict, to mutual harm. Before that one forum, in one suit, the respective rights and the respective liabilities can be ascertained and determined, and each get his own, and be subjected to his own, and not another's. And the equities between the respective stockholders can also be adjusted and settled."

In the recent case of *Runner v. Dwiggins*, 147 Ind. 238, the question as to the right of the assignee of an insolvent corporation to maintain the action was involved, and upon the authority of a large number of the adjudged cases, and the rule as generally laid down in the text-books, his right to maintain the action was denied. Jordan, chief justice, speaking for the court, said: "Certainly, it cannot be asserted with any reasonable support that this peculiar liability imposed by the statutes upon those who become shareholders of a banking association, organized under the existing law, is in any sense an asset, right, or interest of the bank, which it as an insolvent debtor can, by its deed of assignment, pass to its assignee, or in any manner vest the enforcement thereof in him. In the absence of some statutory provision conferring the right, neither the corporation nor its assignee nor receiver can enforce such a liability as that in question."

We have carefully examined the cases cited and relied upon

by counsel for appellants as sustaining their contention. It is true that these cases, while holding that the fund can be reached only by a proceeding in equity, sustain the right of the receiver to enforce the remedy. We are, however, satisfied that the foregoing cases announce the generally accepted ⁵⁵⁷ rule, and that, both upon reason and authority, the additional liability of stockholders imposed by our statute constitutes a fund for the benefit of all the creditors, which may be pursued in equity for their common benefit, by or for all; and an assignee whose trust relates only to the corporate assets acquires no right to enforce this statutory obligation.

The right to maintain the present action is also challenged because it is prematurely brought. It is argued that if, as we have seen, the fund provided by the statute is in the nature of an additional security for the creditors, the liability of the stockholders is secondary, and not enforceable until the assets of the corporation have been exhausted. It is undoubtedly true that this fund does not constitute the primary or regular fund for the payment of the corporate liabilities, and that the corporate funds are the primary resource to which creditors must look for the payment of their debts and the discharge of the corporate obligations; but a well-recognized exception to this rule exists when, by reason of dissolution or insolvency, an action against the corporation would be unavailing: *Cook on Stock and Stockholders*, sec. 200; *Terry v. Tubman*, 92 U. S. 156; *Hodges v. Silver Hill Min. Co.*, 9 Or. 200.

We think the facts averred in the complaint and disclosed by the evidence bring this case within this exception. It appears that the North Denver Bank, on July 18, 1893, was insolvent, and made an assignment of all its assets; that the appellees filed their claims with the assignee, and the same were allowed, and there has been paid only twenty per cent of the original amounts. No further sum having been realized during the length of time that has elapsed, it is evident that the remaining assets, if any, consist of worthless or doubtful claims. Under these circumstances, the creditors ought not to be compelled to await their collection, or delay the enforcement of the statutory liability against the stockholders; but justice requires that the stockholders themselves should be compelled to pay their claims, and look to the assignee for whatever may be realized from the remaining assets: *Moses* ⁵⁵⁸ *v. Ocoee Bank*, 1 Lea, 398; *Stark v. Burke*, 9 La. Ann. 341. As was said in the former case: "They [creditors] will not be

required to wait the collection of doubtful claims, or claims in litigation. The stockholders must pay promptly and take upon themselves the onus of delay and risk as to all such claims." For these reasons we think the foregoing objections to the maintenance of this action by appellees were properly overruled.

It is further contended that the court below erred in its conclusion as to the extent of the liability imposed by the statute, and in rendering judgment against each of the stockholders in double the amount of the par value of the stock owned by them respectively.

The language of the statute is: "Shareholders in banks . . . shall be held individually responsible for debts . . . of said associations, in double the amount of the par value of the stock owned by them respectively."

It is said that the true intent and meaning of this language is to make the stockholders responsible to the amount of stock subscribed, and in addition thereto a sum equal to its par value, or, as expressed by counsel: "He is first liable to the corporation to the full par value of his stock, and next liable to the creditors in an equal amount"; and that this constitutes the double liability contemplated by the statute; that the judgment of the court below in effect imposed upon them a triple liability. As supporting this view, counsel cite Beach on Private Corporations, sec. 152; Thompson's Liability of Stockholders, sec. 37; 1 Cook on Stock and Stockholders, sec. 215; 2 Morawetz on Private Corporations, sec. 881.

For instance, as said by Mr. Beach: "Statutes imposing a liability 'to double the amount of stock held by them' receive the same construction as those making shareholders liable 'to the amount of their stock.'" And like expressions are found in the other works referred to. As supporting this conclusion they cite Perry v. Turner, 55 Mo. 418; Matthews v. ⁵⁵⁹ Albert, 24 Md. 527; Norris v. Johnson, 34 Md. 485; Booth v. Campbell, 37 Md. 522; Schricker v. Ridings, 65 Mo. 208; Gay v. Keys, 30 Ill. 413.

In addition to these Mr. Beach also cites Appeal of Parish (Pa. March 24, 1890), 19 Atl. Rep. 569.

Upon a careful examination of these cases we are unable to find any warrant for the rule as announced. In Matthews v. Albert, 24 Md. 527, and in Norris v. Johnson, 34 Md. 485, the statute under consideration provided that the stockholders were severally and individually liable to the creditors of the com-

pany to an amount equal to the amount of the stock held by them respectively, et cetera, and it was held that the liability to creditors was measured by the par value of the stock, without reference to the amount they may have paid on the stock.

To the same effect is *Gay v. Keys*, 30 Ill. 413. In *Shricker v. Ridings*, 65 Mo. 208, the only question considered was whether a stockholder could be made liable to a creditor when the full amount of stock owned by him had been paid, under section 6, article 8, of the constitution of Missouri as amended in 1870, which enacted that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her"; and the court held that he could not, by reason of the negative form of expression employed, but said: "If the amendment of 1870 had declared in express terms that every stockholder should be individually liable to the amount of the stock owned by him, it might well be argued, on the authority of the cases cited by the plaintiff's counsel, that as they were already liable to the creditors of the corporation for the full amount of their stock, paid and unpaid, the constitution intended to provide further security for such creditors by superadding the individual liability of stockholders in a sum equal to the amount of their respective shares of stock."

We find no expression in any of these decisions that intimates that statutes imposing a liability "to double the amount of stock held" should be given the same signification and receive the same construction as those making shareholders liable ³⁶⁰ "to the amount of their stock," except in *Perry v. Turner*, 55 Mo. 418, where the court refers to section 6, article 8 of the constitution of Missouri of 1865, which provided that stockholders should be individually liable, over and above the stock owned by them, in a further sum at least equal in amount to such stock, as creating a double liability. While in *Appeal of Parish* (Pa., March 24, 1890), 19 Atl. Rep. 569, a case that involved the construction of a statute which, like ours, imposed a liability upon stockholders "to the extent of double the amount of their stock," the court clearly shows that this language is not to be construed to mean the same as that which limits the liability of stockholders "to an amount equal to the stock held," but that the latter phrase imposes a single, while the former imposes a double, liability.

It has been almost uniformly held that when a statute fixes the liability of stockholders "in an amount equal to the stock

held by them," or "to the amount of their stock," it imposes a liability to the amount of the par value of their shares, in addition to their subscription to the stock: *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401; *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454; *Pettibone v. McGraw*, 6 Mich. 441; *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558; *Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166; *Buenz v. Cook*, 15 Colo. 38.

It therefore logically follows that where the language is "in double the amount of stock held," an obligation in double the amount of such par value is imposed: *Appeal of Parish* (Pa., March 24, 1890), 19 Atl. Rep. 569; *Terry v. Little*, 101 U. S. 216.

In the latter case, the charter under consideration provided that any stockholders should "be liable and held bound for any sum not exceeding twice the amount of their shares." After quoting this language, Chief Justice Waite said: "This, as we think, means that on the failure of the bank each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations."

Although the double liability clause, as found in our statute, ⁵⁶¹ is, and for several years has been, in force, either by virtue of constitutional, statutory or charter provisions, in the states of Illinois, Minnesota, and Pennsylvania, we are aware of no case wherein it has been expressly passed on and construed except in the *Appeal of Parish* (Pa. March 24, 1890), 19 Atl. Rep. 569. There are, however, cases which reached the courts of final resort in these jurisdictions where the amount recoverable thereunder was necessarily involved, and while the meaning of this clause was in no way raised or discussed, from an examination of the cases it will be seen that a liability in double the amount of the stock, in addition to the subscription, was enforced: *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *Munger v. Jacobson*, 99 Ill. 349; *Harper v. Carroll*, 66 Minn. 487; *Allen v. Walsh*, 25 Minn. 543.

As we have seen, statutes of this character are intended to furnish a fund exclusively for the benefit of creditors, and under the rule laid down in all the cases, they are to be construed as imposing an individual liability upon stockholders, in addition to their liability to the corporation for the amount of their subscription to the stock. Accepting this as the correct

rule of construction, the plain and obvious import of the language of our act is, to make stockholders in banking associations individually liable for the debts of the association in double the amount of the par value of the stock owned by them, notwithstanding that they may have paid, or are still liable to the corporation, for their original subscription.

But it is said that the judgment is excessive for the further reason that appellees were allowed interest upon their claims. We do not think this claim is well founded. The stockholders are responsible for the debts, contracts, and engagements of the bank, and if, from the nature of the contract or debt, interest was allowable against the bank, it would constitute a part of its indebtedness, for which the stockholders are made liable, if within the maximum liability as fixed by the statute: *Richmond v. Irons*, 121 U. S. 27; *Wheeler v. Millar*, 90 N. Y. 353.

It is also urged that the relation of appellants, as stockholders ⁵⁶² of the bank, was not shown by competent and sufficient evidence. Mr. Root produced and identified what was known as the stock-book of the bank. He testified that the book represented the stockholders in the bank, and was the only one kept for that purpose. Section 508 of *Mills' Annotated Statutes* provides:

"It shall be the duty of the directors or trustees of every such corporation . . . to cause a book to be kept by the secretary or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall within one year have been stockholders of such corporation, showing . . . the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares, and the time when they ceased to be such stockholders. . . . Such books shall be presumptive evidence of the facts therein stated in any suit or proceedings against such corporation, or against any one or more stockholders."

This book conforms to these requirements. The witness also testified that it was kept in the ordinary course of business, while he was connected with the bank, and that he made some of the entries himself, and that the persons named took part in the meetings of stockholders during the period of time their names appeared on the book. We think the book, together with this testimony, was sufficient.

A further ground urged for reversal is that the findings of

the trial court are not supported by proper and competent evidence.

The claims sued upon consist of money deposited with the bank, time and demand certificates of deposit, and drafts that had been issued by the bank, and protested for nonpayment. To prove these claims appellees called as a witness Mr. Root, who was cashier of the bank during the time the deposits were received and the certificates and drafts issued, and who had acted as assignee of the bank since it ceased doing business. He produced and identified what is called the daily balance book, which showed the accounts of depositors, and the time certificate register, and the demand certificate book, ⁵⁰⁸ which showed what certificates of deposit had been issued by the bank, and also the draft-book, which showed the checks or drafts drawn by the bank on the bank which kept its balances in the east.

Objection was made by appellants to the introduction of these books in evidence, on the ground: 1. That they were not properly authenticated; and 2. Because they did not constitute the best evidence, and were not admissible against the defendants. We think these objections are untenable. The witness testified that he was familiar with the books of the bank; that these books were used by the bank in conducting its business; that the bank did not keep an individual ledger, and the daily balance book was the only one that showed the state of the depositors' accounts, and the entries therein were made by the employes of the bank, under his supervision, as cashier, and that of the other officers; that the books had been in his possession since the assignment.

It is insisted that this showing is not sufficient, under our statute (Mills' Annotated Statutes, sec. 4817) to render the books admissible. The object of that section is to enable a party to use his own books as evidence in his own behalf, and is not applicable where the books are introduced to show admissions against the interest of the party making them.

In order to render the books of a party admissible for the latter purpose, it is only necessary that they be shown to be his books, kept in the regular course of his business, and that entries therein were made by himself or an agent, authorized to make them.

In *McHose v. Wheeler*, 45 Pa. St. 32, it was held that "a ledger found after the company had failed, with other papers of the company in the office of a director, and he had left the

state, and which that director had produced in other proceedings as the ledger of the company, is sufficiently proved for admission in evidence as such; and entries therein, showing the nature and amount of the indebtedness of the company to the plaintiffs, are competent evidence upon their part of the fact."

⁵⁶⁴ We think the showing was sufficient to admit the books in evidence. But it is said that the pass-books of plaintiffs were better evidence of the amounts due than this balance-book, and ought to have been produced. These pass-books were small books issued by the bank to each of its depositors, in which the amount of their deposits were entered by the receiving teller at the time they were made. A deposit slip was made out by the depositor, showing the amount of his deposit, and presented with the pass-book. These slips were preserved by the bank, and from them the entries in the daily balance-book was made. The entries in both, therefore, correspond, and those in the pass-books furnish no better evidence of the amounts deposited than the entries in the balance-book; besides, this book showed what its name indicates—the balance remaining to the credit of a depositor after the checks which were drawn against it had been deducted. Nor can we agree with counsel that this evidence was not admissible against appellants. As we have seen, entries made in the due course of business, by those authorized to make them, are admissible against the corporation itself; and since the corporation is a mere legal entity organized for the benefit of its stockholders, and acting in all its dealings for them, and on their account, it follows that it is equally admissible against them. As was said in *Schalucky v. Field*, 124 Ill. 617, 7 Am. St. Rep. 399: "It is true that the entries are made by an officer of the bank and not by the stockholder. But such officer, in making the written entries, acts as the agent and representative, not only of the corporate entity known as the bank, but of the stockholders regarded as unincorporated partners. The written evidence of indebtedness is as binding upon the latter as upon the former."

We think, therefore, the books were properly admitted in evidence, and were competent to show the amount of the deposits for which the bank was liable; that certain certificates of deposit and drafts were issued by the bank, at the time, for the amounts, and to the parties therein named, and that such certificates were still outstanding. But this in ⁵⁶⁵ itself

is not sufficient to entitle the parties to whom these evidences of indebtedness were so issued to recover thereon in this case. The certificates of deposit are negotiable instruments, and transferable by indorsement and delivery. It was, therefore, incumbent upon those who sought to recover thereon to prove their present ownership, and produce them upon the trial, or show by competent testimony that they had been lost or destroyed; otherwise a recovery might be had by the original payee, after he had transferred and parted with his title to the instrument to a bona fide holder, who would have a right to maintain an action thereon, notwithstanding such recovery. With the exception of six of the certificates of deposit sued upon, these essential requirements were not complied with. This is admitted by counsel for appellees, but they contend that the necessity for such proof was obviated by the introduction in evidence of a list of verified claims presented to the assignee and filed by him with the clerk of the district court, and the subsequent action of the court in relation thereto, from which it appears that these claims were allowed by the court, and dividends ordered paid thereon. This claim is based upon the theory that such an allowance constitutes a judgment binding upon the bank, and also upon the appellants. We think this view is erroneous. Such allowance does not constitute a judgment in personam, even against the bank. It is at most a judgment in rem, fixing the status of the claimant toward the assigned property, and establishing his right to participate in the benefits of the assignment: *Eppright v. Kauffman*, 90 Mo. 25.

We think, therefore, that the court erred in allowing a recovery upon these certificates, and upon the Chilcott draft for thirteen dollars and twenty-five cents, without requiring them to be produced upon the trial, or their loss or destruction shown. This necessitates a reversal of the judgment, so far as the allowance of these claims is concerned. But since they are distinct, and can easily be separated from the other claims that were properly proved and allowed, a reversal of the entire judgment may be avoided. The judgment, therefore, as to all the appellees ~~500~~ except those whose recoveries are predicated thereon, is affirmed; and as to them, the judgment is reversed, and the cause remanded, with directions to allow them, or such of them as may elect so to do, a reasonable time in which to supply the proof that we have found to be requisite in such cases.

ON REHEARING.

PER CURIAM. On petition for rehearing on the part of appellants, we have been favored with elaborate and able arguments, both printed and oral, by which the main questions upon which the decision of this cause is predicated, have been very fully presented and argued; but, after mature deliberation, we are satisfied that the views announced in our former opinion are correct, and fully sustained by the authorities cited. One question argued, namely, the failure of appellees to make the bank and assignee parties, should be further noticed. That they were not joined as plaintiffs did not render the complaint defective, in failing to state a cause of action against the stockholders, for the reason already given, that the liability of appellants, as shareholders, is solely for the benefit of the creditors of the bank, and for the purpose of creating a fund over which neither the bank nor its assignee has any control or authority to collect; but conceding that, for the purpose of a complete determination of all the rights involved, they should have been made parties defendant, by virtue of either section 497 of Mills' Annotated Statutes or section 16 of the code, the failure to do so cannot be considered here, because appellants, by answering over, after demurrer, on the ground of defect of parties, have waived the right to raise the question on appeal: *Sams Automatic Car-Coupler Co. v. League*, 25 Colo. 129; nor does the fact that neither the bank nor assignee were made parties defendant in any manner affect the rights of the stockholders, because, whether sued alone, or in connection with the bank and its assignee, they ⁵⁶⁷ would have the right to interpose any defense to the claim of the creditors which the bank could.

In support of their petition for rehearing, appellees have brought in and filed with the clerk of this court certain evidences of indebtedness of the bank, which were not presented on the trial below, and with respect to which the judgment has been reversed, and ask that we now modify our former opinion, by directing judgment upon these claims. We cannot consider original evidence in the case, and it is obvious, therefore, that the directions in the original opinion, with reference to these matters, are proper.

Petitions for rehearing denied.

Campbell, C. J., not participating in this, or former, opinion.

OBJECTIONS NOT MADE AT THE TRIAL.—nor included in any assignment of error, cannot be urged for the first time in the appellate court: *Slater v. Chapman*, 67 Mich. 533, 11 Am. Rep. 593; *London v. Youmans*, 31 S. C. 147, 17 Am. St. Rep. 17.

CORPORATIONS—LIABILITY OF STOCKHOLDERS.—When a corporation has become wholly insolvent, and has ceased to do business, and has assigned its property for the benefit of creditors, suit to enforce their statutory liability may be commenced against the stockholders by creditors, without any of them first recovering judgment and having an execution returned unsatisfied: *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888.

CORPORATIONS—INSOLVENCY—AMOUNT OF STOCKHOLDERS' LIABILITY.—Under a provision of a state constitution declaring that each stockholder in a corporation shall be liable to the amount of the stock held by him, each is liable for corporate debts, in addition to the risk of losing the amount of his stock, though he has paid therefor in full: *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626; monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 816, 834-845.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—EVIDENCE.—If the name of a person appears on the stock-book of a corporation as a stockholder, this is prima facie evidence that he is the owner of stock: *Holland v. Duluth Iron etc. Co.*, 65 Minn. 324, 60 Am. St. Rep. 480; monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 866. In an action to charge the defendant with liability as a stockholder in a corporation against one who denies his membership, a stub of a blank certificate book containing memoranda indicating that a certificate of shares of stock had been issued to him is not admissible against him: *Hinsdale Sav. Bank v. New Hampshire Bkg. Co.*, 59 Kan. 716, 68 Am. St. Rep. 391.

EVIDENCE—AN ACCOUNT-BOOK OF ORIGINAL ENTRY, fair on its face and shown to have been kept in the usual course of business, is evidence even in favor of the party by whom it is kept: *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, and note.

CORPORATIONS—INSOLVENCY—PARTIES—THE STATUTORY LIABILITY of the shareholders in an insolvent corporation is exclusively for its creditors' benefit, and is enforceable by them alone, and not by the corporation, and the creditors must sue in their own right and not by or through the corporation: *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888. As to when the corporation and all the stockholders are proper parties defendant in an action to enforce the statutory liability of stockholders for corporate debts, see the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 815, 857.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

**NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY v. SCOVILL.**

[71 CONNECTICUT, 136.]

RAILROADS—RIGHT TO EXCLUDE THIRD PERSONS FROM PROPERTY.—A railroad company has the same right belonging to every owner of real estate to exclude from entry upon it all who come without its consent and can show no superior legal title.

RAILROADS—RIGHT OF ENTRY UPON PROPERTY OF—Independent of contract, a right of entry upon the property of a railroad company exists in all who wish to avail themselves of its services as a common carrier, and enter for that purpose at a proper place, so long as they pay due regard to the reasonable regulations established by the company.

RAILROADS—RULE PROHIBITING HACK DRIVERS FROM PLYING TRADE ON STATION GROUNDS.—The rule of a railroad company that no person should solicit the carriage of passengers or their baggage on its station grounds unless duly licensed by it, and prohibiting all owners and drivers of public hacks and express wagons not so authorized from plying their business on said grounds, does not prevent the driver of any vehicle from entering the station grounds to fulfill a contract of employment with a passenger or intending passenger.

RAILROADS—SOLICITING ON GROUNDS OF—A railroad company may lawfully confine the business of soliciting the carriage of passengers and baggage upon its station grounds to one or more licensees, provided such regulation is not inconsistent with the reasonable accommodation of its patrons.

INJUNCTION TO PREVENT TRESPASS.—Injunction is an appropriate remedy to prevent continued trespasses upon land in the use of which the public interest is involved, where the damage is great, and the defendant has not sufficient property to respond in an action at law.

PLEADING TO OBTAIN INJUNCTION.—A complaint is sufficient if, upon any state of proof which its allegations justify, the court can, in the reasonable exercise of judicial discretion, grant an injunction.

Suit for an injunction to restrain the defendant from entering the plaintiff's station grounds at Middleton, and there soliciting the carriage of passengers and baggage. A demurrer to the complaint was sustained, and judgment was rendered for the defendant, from which the plaintiff appealed.

Edward D. Robbins and Clarence E. Bacon, for the appellant.

M. Eugene Culver, for the appellee.

145 BALDWIN, J. A railroad company which is operating a railroad in its possession has the ordinary right belonging to every owner of real estate to exclude from entry upon it all who come without its consent and can show no superior legal title. A right of entry exists in all who wish to avail themselves of its services as a common carrier and enter for that purpose at a proper place, so long as they conduct themselves with propriety and pay due regard to such reasonable regulations ¹⁴⁶ as it may have made and published for the orderly and prudent management of its business. It is for their especial use that it is permitted to maintain its stations and station grounds; and the law establishes a right of entry in their favor, independent of any contractual relation between them and the company.

It appears from the complaint that the plaintiff, by its board of directors, adopted a regulation excluding from its station grounds all persons who, without special permission in writing, should come to solicit the carriage of passengers or their luggage. The defendant, knowing the regulation, soon afterward entered upon its station grounds in Middletown to solicit business of that description, and did solicit it successfully. He has since repeatedly made similar entries for the same purpose, and threatens to continue them daily and many times a day. The plaintiff has been greatly damaged by this course of conduct, but the defendant has not sufficient property subject to execution to answer in damages, should the plaintiff sue at law. For that reason and to avoid a multiplicity of suits, a remedy is sought by injunction.

The main question to be determined is whether the regulation was a reasonable one. It contains two prohibitions—one against soliciting business upon station grounds, and the other against plying there the business of a carrier of passengers or luggage. The former, a violation of which is charged against the defendant, applies to every person, whatever may be his ordinary occupation; the latter only to two classes of carriers.

The extent of the land about a passenger station which may be appropriated as station grounds is determined by the railroad company, with the approval of the proper authorities of the state, in view of the number of those who will probably have lawful occasion to use the station from time to time, and the accommodations necessary for their convenience and for the proper management of the road.

Every one who is driven to a station to take passage on a train can select his own conveyance, but he has no absolute ¹⁴⁷ right to insist on its admission within the station grounds. His driver has no greater right. These grounds may be, and in cities often must be, so cramped as to preclude the entrance of any vehicles so employed. Where the space is greater, the question of admitting them is to be determined wholly by the convenience of the passenger and the railroad company. That of the driver or owner of the vehicle need not be consulted, except so far as it is involved in that of those whom he is carrying to the station.

In regulating matters of this kind, a wide discretion is necessarily intrusted to the managers of the railroad. They are in a situation which should make them the best judges of what promotes the comfort of those who ride upon their road. Courts will always be slow to pronounce unreasonable any rule purporting to be directed toward that end, which they have deliberately adopted.

That now under review cannot fairly be construed to prevent the driver of any vehicle from entering the station grounds of the plaintiff to fulfill a contract of employment with a passenger or intending passenger. It forbids him from entering such grounds to solicit such business, or to ply there the business of a hack driver or baggage expressman. The latter prohibition, when found in a regulation of this nature, cannot be taken to cover the pursuit of such business by the conveyance of a passenger or his luggage in the execution of a lawful contract already made. The word "ply" imports the performance of repeated acts of the same kind. A reference to plying a business at a certain place ordinarily imports that such place is a seat of the business, and such in law is its meaning as used in the rule now in question.

It appears from the complaint that the station grounds at Middletown are sufficiently large to allow the establishment there of a public stand at which to ply the carriage and express business, and also that an exclusive privilege for maintaining

such a stand there has been granted by the plaintiff to a third party.

Such a grant was within its lawful powers, provided its terms were not inconsistent with the reasonable accommodation ¹⁴⁸ of the passengers upon its road. Nothing appears on the record to indicate any such inconsistency. It may well be more convenient for them to deal with a single local carrier, than to be met, on alighting from their train, by importunate solicitations from a number of rival competitors for their custom; and, in the absence of averments to the contrary, it is to be presumed that the prices at this stand are fair and the service sufficient. If any of them prefer that of some other person, they can secure it by an order in advance, which would justify his entrance on the grounds; or, by passing by the stand established there and going into the streets outside, to engage whomsoever they think fit.

It follows that the defendant had no right to enter the Middletown station grounds for the purpose of soliciting business. It is contended, however, that be this as it may, an injunction was not the proper remedy.

The averments that the defendant had inflicted great damage on the plaintiff, and had not sufficient property, subject to execution, to respond to the judgments, should he be sued at law, were statements and sufficient statements of fact. It would not have been good pleading to set out the evidence which might be adduced in their support. Enough circumstances were elsewhere disclosed to show that the damage might be great from the obstruction caused by the presence of intruders to the expedition of trains and the proper management in general of the plaintiff's business.

A judgment at law, also, would be no guaranty against future trespasses, and it is explicitly alleged that these are contemplated and threatened. Such wrongs in respect to land in the use of which the public interest is involved may be prevented by injunction: *Burlington v. Schwarzman*, 52 Conn. 181, 184, 52 Am. St. Rep. 571; *Stamford v. Stamford Horse Ry. Co.*, 56 Conn. 381, 395.

The action is not barred because Carrier, who holds the exclusive privilege in which the defendant seeks to share, could have brought a similar one or may have brought this one. It is immaterial to the defendant, who is paying the ¹⁴⁹ expenses of the litigation or directing its course. He has violated the right of possession which exists in favor of the plaintiff as to

its Middletown station grounds, and is answerable to an action in its favor precisely as if its contract with Carrier had never been made. Had Carrier sued at law in the plaintiff's name, the damages recovered would have been those only which had been suffered by the plaintiff. This remedy in equity also stands upon its rights, not his.

The complaint was sufficient if, upon any state of proof which its allegations justified, the court could, in the reasonable exercise of judicial discretion, have granted an injunction. Tested by this criterion (and without intending to determine whether one should or should not issue in this cause), the demurrer should have been overruled.

There is error and the judgment of the superior court is set aside.

In this opinion the other judges concurred.

RAILROADS—EXCLUSIVE RIGHT TO HACK DRIVERS.—The authorities are conflicting upon the question of the right of a railroad company to grant exclusive privileges or preferences to hackmen or other solicitors. The rule in the principal case that a railroad company can grant the exclusive right to solicit the carriage of passengers and baggage to one hackman is sustained in Massachusetts: See *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661. The weight of authority seems to be the other way, however: See *Kalamazoo Hack etc. Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693, and the extended note thereto; *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745, and note.

INJUNCTION TO PREVENT TRESPASS.—It is not usual to issue an injunction to restrain a trespass merely because it is such. Some other injury, such as irreparable injury or inadequate remedy at law must be shown: *McGregor v. Silver King Min. Co.*, 14 Utah, 47, 60 Am. St. Rep. 883, and note thereto collecting the cases.

SMITH v. GILBERT.

[71 CONNECTICUT, 149.]

EXECUTION—INTEREST TOO REMOTE.—Where a testator left property to his wife for life, and after her death to be divided equally between two sons, and if either son should die before the decease of his wife, leaving lawful issue, such issue should inherit in the place of the parent so deceased, the interest in remainder which such sons acquired is too remote and uncertain to be subject to attachment.

EXECUTION—INTEREST SUBJECT TO.—Under a statute providing that execution may run against "goods or lands" of the defendant, an interest which may be strictly neither goods nor land, but which is nevertheless clearly property, capable of being fairly sold and appraised, and which is subject to the debtor's control, is attachable property.

EXECUTION—ATTACHMENT OF UNCERTAIN INTEREST.—An uncertain interest in property, incapable of just appraisal, and possibly of no value, is not subject to attachment.

EXECUTION.—In Connecticut no estate in land can be taken on execution, unless at its "true value;" hence an interest, the true value of which cannot be ascertained, cannot be taken on execution.

EXECUTION—UNCERTAIN INTEREST.—The process of foreign attachment is not adapted to secure an interest in property, to the possession and enjoyment of which the defendant may never succeed.

Action in the nature of assumpsit against a nonresident. The defendant filed a plea to the jurisdiction of the court.

J. Belden Hurlbutt and H. Whitmore Gregory, for the defendant.

George P. Carroll, for the plaintiffs.

¹⁵² HALL, J. The complaint describes the plaintiffs as residents of Maryland, the defendant as a resident of Wisconsin and as owning property in Connecticut.

By the doings of the officer, as set forth in his return upon the original complaint, the plaintiffs claim to have attached, under sections 910 and 916 of the General Statutes, the defendant's interest in the land owned by his father at the time of his death, and to have attached, under sections 1231 and 1245, the legacy or distributive share to become due to the defendant from the estate of his father, and to have garnisheed the defendant's interest in certain funds belonging to his father's estate, deposited in certain savings banks.

The defendant appeared by attorney for the sole purpose of pleading to the jurisdiction of the court. The substance of his plea is, that all the parties to the suit are nonresidents; that no service was made upon the defendant, and that at the time of the alleged attachment the defendant owned no interest in the property described in the officer's return, and no property in Connecticut subject to attachment; and that there was no debt, legacy, or distributive share due or to become due him from his father's estate liable to attachment, and no sum due him from said savings banks liable to garnishment.

It is admitted that all the money and property claimed to have been attached belongs to the estate of the defendant's father, and that the defendant owns no property in this state, ¹⁵³ except such interest in said attached property as he may have under the third and fourth provisions of the will of his father, Harmon Gilbert, executed in 1889 and admitted to probate in 1893, which provisions are as follows: "Third. I give to my wife, Mary Elizabeth Gilbert, during the term of her

natural life, the use and income of all the rest, residue, and remainder of my estate, both real and personal, of every description whatsoever and wheresoever it may be, which I may possess at the time of my decease. This shall include the right to cut all necessary wood for fuel, or timber for such repairs as may be needed upon the buildings and adjacent fences, and it is my wish that the said buildings and fences about the same be kept in proper repair so long as my wife shall use and occupy them as aforesaid. Fourth. After the decease of my wife, to whom the use of my property has been given as aforesaid, I order and direct that my estate, both real and personal, be divided equally between my two sons, Thomas F. Gilbert of Wilton, and Henry W. Gilbert of Poughkeepsie aforesaid, to wit, one equal share to said Thomas F. and one equal share to said Henry W., and if either of my said sons shall die before the decease of my said wife, and leave lawful issue, it is my wish that said issue shall inherit in the place of the parent so deceased."

As it is not claimed that the superior court has jurisdiction of the person of the defendant, who is a nonresident upon whom no service was made in this state, the power of the court in this case is limited to an appropriation of the defendant's property within this state, to the payment of the plaintiffs' debt; and so the sole foundation of its jurisdiction is the existence in this state of property which, under process of court, may be thus taken and appropriated: *Easterly v. Goodwin*, 35 Conn. 273; *O'Sullivan v. Overton*, 56 Conn. 102.

Unless the property in question is of such a character that it may be subjected to the payment of the defendant's debt, under our statute laws regulating the manner in which property may be taken upon mesne and final process, the superior court cannot entertain this action.

The estate of Harmon Gilbert, at the time of the claimed ¹⁵⁴ attachment, consisted of real estate of the appraised value of about two thousand dollars, household furniture of the appraised value of two hundred dollars, and of about four thousand dollars in money. The estate has not yet been settled. The widow is still living, as are the two sons, Thomas F., and the defendant. Each of said sons had a child at the date of the will. The defendant has another child, born since the testator's death. All said children are still living.

In 1647, it was laid down as the foundation of our insolvency law, that "every man should pay his debts with his estate, be it what it will be, either real or personal": 1 Col. Rec. 151. In

1650, the property subject to attachment was described as "goods" and "lands": 1 Col. Rec. 511. In 1750, it is described as "the goods or chattels of the defendant, and for want of them the lands or person": Revision of 1750, p. 3. In section 893 of the General Statutes of 1888, as "the estate of the defendant, both real and personal, and for want thereof against his body." By section 1155 of the General Statutes of 1888, an execution runs against the "goods or lands" of the defendant.

It is only by such general language and by the various acts exempting certain property from execution, that the legislature has declared what property, or what interest in property, may be taken by attachment.

In conformity with the settled policy of this state, that all the property of a debtor should be holden for the payment of the debts of its owner, our courts have construed the language of these statutes as rendering liable to attachment certain legal and equitable interests in property, the absolute or legal title to which property is not in the debtor, but which interest is within his control and can be fairly appraised or sold; as the interest of one partner in the copartnership property, the interest of a cestui que trust in real estate, an equitable interest in shares of stock, a mortgagor's equity of redemption, and such other interests in goods or lands, whether legal or equitable, as, with justice to both debtor and creditor may, in the manner provided by statute, be appropriated to the payment of the former's debts: *Punderson v. Brown*, 1 Day, ¹⁵⁵ 93, 96, 2 Am. Dec. 53; *Davenport v. Lacon*, 17 Conn. 278; *Johnson v. Connecticut Bank*, 21 Conn. 148, 156; *Bunnell v. Read*, 21 Conn. 586; *Middletown Sav. Bank v. Jarvis*, 33 Conn. 372, 379.

We have, however, never held that an uncertain interest, incapable of just appraisal, and possibly of no value, may be thus sequestered for the creditor's doubtful benefit, and we think we ought not to so hold. When an interest which may be strictly neither goods nor land is, nevertheless, clearly property, capable of being fairly sold and appraised, which is subject to the debtor's control, and which ought to be responsible for his debts, we say that the policy of the state for two hundred and fifty years clearly indicates that such interest is attachable property within the meaning of the statute. But the same reasoning which has induced our courts to place such a construction upon the language of our statutes, leads us to the conclusion that the defendant's interest in his father's estate is not attachable within the meaning of the law. While it is unjust that one

should keep from his creditors property which can be fairly sold or applied to the satisfaction of his debts, it is equally unjust that a creditor should seize and destroy an interest of his debtor which is so uncertain and contingent that it cannot be fairly sold or appraised. The policy of the law justifies the extension of the right of attachment to property which, though not strictly within the letter, is within the equity of the statute. It does not justify such an extension of that right as will be likely to result in the destruction of a paternal gift which can be of no present value to anyone, and may never be of value to the debtor or his assignees.

It is the purpose of our law that no estate in land can be taken on execution, unless at its "true value": Gen. Stats. sec. 1182. That value is to be ascertained by an estimate made by three disinterested freeholders. If the estate be one less than a fee simple, they must be informed of its nature and extent before they can be in a position to make this estimate, and the estate must also be of such a character that its value can then be determined with reasonable precision.

Harmon Gilbert in his will undertook to create several estates ¹⁵⁶ in the land now in question. Several different views of the results of his dispositions were stated in the argument of the cause, and others perhaps might be suggested. The will has never been judicially construed, and it would be undesirable to determine its precise effect in this proceeding, since all the parties in interest are not before us. It is enough to say, and such is our opinion, that the interest taken by the defendant is not one the true value of which can, under present circumstances, be ascertained by appraisers on execution with reasonable precision.

By the garnishment of the savings banks and the executor, there has been no such attachment of personal property of the defendant as gives jurisdiction to the superior court. As at the time of the attachment there was no sum due the defendant from the banks, either as a legacy or otherwise, they were not his debtors, and nothing was therefore secured by the foreign attachment.

By the service of the garnishee process upon the executor, it was not attempted to attach any present interest of the defendant in the money or personal property of the estate. The purpose was to attach a legacy to become due. The statute provides that "from the time of leaving such copy, . . . any legacy, or distributive share due, or that may become due to

him [the defendant] from such executor, . . . shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover": Gen. Stats., sec. 1231. Section 1253 provides that when judgment is rendered for the plaintiff in the action by foreign attachment, any legacy or distributive share at the time of the attachment, "due or to become due to the defendant from any garnishee as an executor," shall be liable for the payment of such judgment.

At the time of the attachment there was no legacy due or to become due the defendant, in the sense in which those words are used in the statute. The process of foreign attachment is unadapted to secure an interest in remainder so remote and uncertain. It contemplates an uninterrupted and continuous possession by the garnishee from the date of the attachment to that of the demand on execution. Under the ¹⁵⁷ will in question, a paramount right of possession existed in favor of the holder of the life estate, and it was uncertain whether after her death the enjoyment of the property would pass to the defendant. The executor has no power to hold enough of the personal property and money of the estate to pay this possible legacy, until the happening of the events upon which the legacy depends, and until demand is duly made upon him as garnishee upon execution in the action by foreign attachment. Before that time the court of probate may order the money and personal property to be delivered to the widow, upon her giving a proper bond, and upon her failure to give such bond the court of probate will appoint a trustee to take charge of such estate during the continuance of the life estate: Gen. Stats., sec. 559.

As the defendant's interest in the property in question was not attachable, the court has no jurisdiction.

The superior court is advised to render judgment for the defendant.

In this opinion the other judges concurred, except Andrews, C. J., who dissented from so much of it as held that the defendant's interest in the realty could not be attached.

ATTACHMENT—PROPERTY SUBJECT TO.—The undivided interest of an heir in land under administration is subject to attachment, as such attachment does not dispossess the administrator, nor interrupt the administration: *McClellan v. Solomon*, 23 Fla. 437, 11 Am. St. Rep. 381, and note. A legacy in the executor's hands is not subject to foreign attachment for the legatee's debt: *Shewell v. Keen*, 2 Whart. 332, 30 Am. Dec. 266, and note. Attachment process operates only upon such interests of the debtor as exist at the time it is served, and not upon such as may afterward arise: *Arrington v. Screws*, 9 Ired. 42, 49 Am. Dec. 408, and note.

BAXTER v. CAMP.

[71 CONNECTICUT, 245.]

CONTRACT FOR BENEFIT OF THIRD PARTY.—A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance.

CONTRACTS—ACTION UPON.—The general rule is, that an action at law for the breach of a contract can only be brought by a party thereto.

CONTRACT FOR BENEFIT OF THIRD PARTY.—A third person may maintain an action upon a contract made for his direct, sole, and exclusive benefit, where it was part of the agreement that its object should be communicated to him.

CONTRACT FOR BENEFIT OF THIRD PARTY—PROMISE OF HUSBAND TO WIFE TO PAY MONEY TO SON.—A promise made by a husband to his wife to pay her son a certain sum of money upon her death, if the son were then living, cannot be regarded as a promise made for the direct, sole, and exclusive benefit of the son, and the son can maintain no action for the breach thereof.

CONTRACT—WHO MAY SUE—EXECUTORS AND ADMINISTRATORS.—The personal representative of the deceased wife is the only party who can sue at law for the failure to perform a contract made by a husband with such wife to pay her son a certain sum of money upon her death, if the son were then living.

PLEADING—CLAIM FOR RELIEF.—Where a complaint contains several counts, separate claims for relief should follow the complaint as a whole and not be appended to each separate count.

EVIDENCE—EXPENSES OF FUNERAL AND LAST ILLNESS.—In an action by a son upon a contract made by the defendant with his deceased wife to pay her son a certain sum of money upon her death, testimony as to what the defendant had expended for the charges of his wife's last sickness and of her funeral, and of his narrow means, is properly excluded as not being within the issue.

EVIDENCE—ORAL DECLARATIONS OF DECEASED.—A statute, permitting relevant declarations of a deceased to be given in evidence, applies only in favor of those who sue or defend in the interest of the estate, either as personal representatives, heirs, and distributees, or purchasers by will; it does not embrace purchasers by contract.

WITNESSES—CORROBORATION.—A witness cannot be corroborated by proof of his previous statements to the same effect.

BURDEN OF PROOF—MEANING—DEFINITION.—The term "burden of proof" may have two meanings. It may be used to indicate the burden which rests on every party to a cause of going forward, if he be met by a traverse, and establishing the total proposition or series of propositions which constitute his disputed case. It may also be used to denote a duty cast by law upon one party to meet and rebut the effect of some piece of evidence introduced by the other.

BURDEN OF PROOF—EXECUTION OF AND SIGNATURE TO INSTRUMENT.—In a suit upon an instrument, which upon its face shows that the signature had been crossed out, or that it had been written over a line of crosses, or that it had been rewritten over a previous signature which had been erased, the burden of establishing the execution of the instrument and its delivery to him, bearing the defendant's signature, is on the plaintiff.

BURDEN OF PROOF.—A party is always and continuously bound to prove his side of the case, if he is met by a traverse.

Action to recover damages upon a written instrument in the nature of a promissory note, or for other proper relief. The defendant executed and delivered to his wife the following paper:

“Madison, June 20, 1887.

“I do promise to pay my wife’s son, Dwight G. Baxter, the sum of eight hundred dollars after her decease, if living, if not to her next heirs to the property, without interest till after her death.

ALEXANDER CAMP.”

Afterward she gave the paper to the plaintiff, saying the defendant would pay it and there would be no trouble about it. He gave no consideration to the defendant for it. After her death, he demanded payment, which was refused. Judgment for the plaintiff. Defendant appeals.

Henry G. Newton, for the appellant.

Oswin H. D. Fowler, for the appellee.

248 BALDWIN, J. The main question in this case is whether an action upon a simple contract, by the performance of which a third party would receive a direct benefit, can be maintained by him.

The general principles, upon the application of which the answer must depend, are well settled. Briefly stated, they are these: An action at law for the breach of a contract can only be brought by a party to the contract. It rests on a violation of an obligation to the plaintiff which the defendant had assumed and promised him to perform. If the contract does not state in express terms to whom the promise is made, the law declares that it is made to the person from whom proceeded the consideration by which it is supported: *Treat v. Stanton*, 14 Conn. 445, 451. If it names a party to the contract as the promisee, a third party may maintain an action, the contract not being under seal, on proof that the other acted in the transaction merely as his agent; and so assumpsit may be maintained against such a party, though the contract with the agent be under seal, if the principal’s interest appears upon its face, and he has accepted the benefit of its performance: *Briggs v. Partridge*, 64 N. Y. 357, 364, 21 Am. Rep. 617.

There are certain classes of cases which are often treated as establishing exceptions to these rules of decision, but which

can, with at least equal propriety, be deemed illustrations of their rightful application under exceptional conditions.

One class, found mainly in the older English reports, and unsupported by the later ones, springs out of contracts in the nature of marriage or family settlements, under which a direct benefit is secured to children or other near relatives. Here the unity of the family has been taken into account, and the consideration of marriage deemed to extend to its issue.

Another class embraces promises of a certain kind, made to one man for the direct, sole, and exclusive benefit of another. ²⁴⁹ Thus C may sue for money paid to A for his use by B, when it was part of their agreement that the payment and its object should be communicated to him. Here A is in the position of a forwarding agent for C, and when the latter is informed of the transaction and assents to it, this may be properly treated as a ratification. There are other instances, including bailments in trust or to hold for a third person, under circumstances implying the assumption of a specific duty toward him, that cannot be brought under the law of principal and agent, under which an equitable action, at least, can be sustained by one not a party to a contract, to secure its benefits; but the remedy can never be pressed beyond the right, and can seldom, if ever, extend to a stranger to the consideration, who is not in some relation of privity with the nominal promisee: *Treat v. Stanton*, 14 Conn. 445; *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 29 Conn. 374; *Clapp v. Lawton*, 31 Conn. 95; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *National Bank v. Grand Lodge*, 98 U. S. 123; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Tweddle v. Atkinson*, 1 Best & S. 393; *Pollock on Contracts*, c. 5. Unguarded expressions are to be found in some of the earlier opinions of this court, which countenance the broad proposition that where a promise is made to one man for the benefit of another, the latter may sustain a suit upon that promise; but no such doctrine has ever been applied to govern our determination of a cause: *Crocker v. Higgins*, 7 Conn. 342; *Steene v. Aylesworth*, 18 Conn. 244, 252.

The contract which is the foundation of this suit was made between a husband and wife, who married after the act of 1877 (Gen. Stats., sec. 2796) went into effect. The defendant had received money from her to use in his business. They evidently meant by this paper to state the amount for which he was to be accountable, to preclude any claim for interest upon it during her life, and to secure it upon her decease to those near-

est to her in blood, who would naturally succeed to her estate. The sum thus ascertained is described as "property," and, in the event of her surviving her son, was to pass in the ordinary lines of inheritance. ²⁵⁰ Such an instrument cannot be regarded as executed for the direct, sole, and exclusive benefit of the plaintiff, nor yet as in the nature of a family settlement. Its immediate object was to protect the interests of his mother. It was the adjustment of an unsettled account, followed by provisions designed to serve the purpose of a testamentary disposition. It does not appear that the parties to the agreement intended or contemplated that the plaintiff should be informed of its existence during his mother's life. It does appear from its face that he could derive no benefit whatever from its provisions, should he not survive her. The only party who can sue at law for a failure to perform it is the personal representative of Mrs. Camp; and the claim made by the defendant in the court of common pleas that, if any such action would lie, it must be one by the administrator of her estate, should have been sustained.

It would not be our duty to order a new trial on this account, if the error was one that could not have affected the appellant injuriously: Pub. Acts 1897, sec. 15, p. 892. Such would be its character if the plaintiff could have maintained an action for equitable relief, and compelled the defendant, in that, to account to him for an amount equal to that of the damages which he has recovered in the judgment appealed from. But to any such action the administrator of Mrs. Camp's estate would be an indispensable party, and we cannot say that in one brought by him, or in which he was made one of the defendants, the same result would have been reached.

The present suit must be regarded as one sounding in damages only. The plaintiff has set forth his cause of action in two counts. The first is in the form of a complaint upon a promissory note; describing the paper which has been under consideration, as such, and making it an exhibit. The second states that the plaintiff is the son and sole heir of Mrs. Camp; that she owned separate property, which she transferred to the defendant on his giving her a note for eight hundred dollars, of which the exhibit is a copy; that she agreed to accept it, and did accept it in full satisfaction of her claim; that she afterward delivered ²⁵¹ it to the plaintiff, and has since died; and that the defendant, though payment has been demanded, refuses to make it or to account to the plaintiff for said sums in any manner. To the first count is appended a claim for nine

hundred dollars damages; to the second, two claims, one for nine hundred dollars damages, and one for "such other relief as is just and right in the premises."

There was no propriety in thus dividing the statement of the cause of action. Whatever cause there was for bringing suit arose out of a single transaction, and that was fully stated in the second count: Craft Refrigerating Machine Co. v. Quinniapiac Brewing Co., 63 Conn. 551, 564. Calling the exhibit a note did not make it such; nor was it material to the right of recovery whether it was or was not of that character.

It is also a violation of the rules of pleading, in any case of a complaint containing several counts, to append to each separate claims for relief. Such claims follow the complaint as a whole. The plaintiff is to state his whole case first, and then the relief which he seeks, whether it be of one or several kinds, and whether referable to all or to but one or more of the several counts.

The only possible ground for considering the relief asked in this action to be of an equitable nature is the second claim. The rule on this subject is that "a party seeking equitable relief shall specifically demand it, as such, unless the nature of the demand itself indicates that the relief sought is equitable relief": Practice Book, sec. 10, p. 13. Nothing of that kind is indicated in either count. Each purports to be for the collection of an indebtedness by note, and neither the terms of the agreement, called by that name, nor the circumstances alleged, suggest any occasion for an equitable accounting.

As a new trial or a new suit may bring up again some of the question as to the admission or weight of evidence which were made in the court below, and involved in the reasons of appeal, it is necessary to dispose of them, so far as may be, at this time.

Testimony as to what the defendant had expended for the ²⁵² charges of his wife's last sickness and of her funeral, and of his narrow means, was properly excluded. It did not come within the issue; but we express no opinion as to whether these facts might not be taken into account in adjusting any demand against him in favor of her personal representatives or in which they may have an interest. As to that he has not been heard, and the occasion for considering it has not arrived.

There was error in the admission of Mrs. Camp's oral declarations. General Statutes, section 1094, only applies in favor of those who sue or defend in the interest of the estate, either

as personal representatives, heirs and distributees, or purchasers by will. It does not embrace purchasers by contract: *Lockwood v. Lockwood*, 56 Conn. 106; *Pixley v. Eddy*, 56 Conn. 336. Nor, so far as concerns her remarks to the plaintiff, can they be deemed part of the *res gestae* attending the delivery of the paper. They went to characterize or explain, not that act, but a prior transaction.

The witness' offer to corroborate the defendant's testimony by proof of his previous statements to the same effect was properly excluded: *Builders' Supply Co. v. Cox*, 68 Conn. 380.

The instrument in suit, when produced in court, showed upon its face either that the signature had been crossed out, or that it had been written over a line of crosses such as are commonly used for canceling written words, or that it had been rewritten or retraced over a previous signature which had been first erased. Which of these things was true could only be disclosed by extrinsic evidence. The defendant took the stand and testified that he had crossed out his signature immediately after making it, and long before it came into the hands of the plaintiff. Thereupon the court ruled that, as he admitted that he made the crosses, he had the burden of proving that he made them with his wife's consent, and, though he also testified that she gave this, found the fact against him.

The term "burden of proof" is an ambiguous one. It may be used to indicate the burden which rests on every party to a cause, presenting a claim for relief or pleading in avoidance, of going forward, if he be met by a traverse, and establishing ²⁵³ what is well defined by an authoritative writer on the law of evidence, who has done much toward setting it in scientific form, as "the total proposition or series of propositions which constitute his disputed case": *Thayer's Preliminary Treatise on Evidence*, 380. It may also be used to denote a duty cast by law upon one party to meet and rebut the effect of some piece of evidence introduced by the other, by proof of what may suffice to overbear it in the mind of the trier.

In the finding in the present case it is obviously employed in the latter signification. The court of common pleas held that the production of the paper in the condition in which it was, followed by the admission of the defendant that he had canceled his signature to it, cast upon him the duty of satisfying the trier that he canceled it with his wife's consent.

The burden of proof, so far as regarded the duty of going forward and establishing the execution of the instrument and

its delivery to him bearing the defendant's signature, was on the plaintiff from first to last. Taking the term in this sense, it is true that the burden of proof never shifts: Barber's Appeal, 63 Conn. 393, 403. A party is always and continuously bound to prove his side of the case, if he is met by a traverse. But he may adduce some evidence to which the law assigns, *prima facie*, a certain degree of probative effect. In that event, his adversary comes under the burden of meeting the presumption thus raised against him by evidence of greater weight. If the document in suit, with the defendant's admission, sufficed in law to create a presumption that the signature has canceled without Mrs. Camp's assent, then the ruling in question was correct; and then only, since the other evidence relied on by the trial court as to the declarations of Mrs. Camp was improperly admitted.

There was no sufficient ground for any presumption either of law or fact which could throw upon the defendant the burden to which he was thus subjected. The plaintiff's case rested on a document, the defendant's signature to which had plainly been the subject of erasure, alteration, or cancellation. He was bound to prove that the defendant's signature ²⁵⁴ was still upon it, or else that it was upon it when delivered to Mrs. Camp, and had not since been canceled with her consent. The document did not, alone, establish either fact. Proof that the defendant canceled his signature raised no presumption that it was canceled without his wife's consent. Fraud is never presumed; and still less crime. The question presented for decision, as to whether the alterations were authorized or unauthorized, was simply beclouded by an appeal to the rules respecting burden of proof as applicable to presumptions arising in the course of a trial. It was to be decided in view of all the circumstances before the court, and guided by no other rule as to the *onus probandi* than that which requires a plaintiff, where the defense is a denial, to prove his case: *Bailey v. Taylor*, 11 Conn. *531, 29 Am. Dec. 321.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

WITNESSES—CORROBORATION.—As a general rule, a witness may not be supported by proof of prior declarations to the same effect: *People v. Mayne*, 118 Cal. 517, 62 Am. St. Rep. 256. As to when such prior declarations may be proved, see *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413.

BURDEN OF PROOF.—On the general question of burden of proof, see the note to *Foster v. Reid*, 16 Am. St. Rep. 439.

Contract for the Benefit of a Third Party—When May He Sue thereon?*

Preliminary Statement.—It is a general rule that a contract cannot confer rights on a person who is not a party to it, and accordingly no one can sue for a breach of a contract who is not such party, or who does not derive rights from an original party thereto. This rule, in its general application, is recognized everywhere, subject to certain exceptions in some jurisdictions. In England, this principle is recognized almost to its full extent, subject only to the exception that if the contract is such as to constitute the promisor a trustee for the benefit of the third person, the latter may sue in equity. In the United States, on the other hand, an exception is made generally in the case of contracts entered into for the purpose of conferring benefits on third parties, and such third party may sue at law upon the agreement. There are, therefore, two general doctrines concerning the right of a third party to sue upon a contract made for his benefit, the English and the American, each of which has its peculiar variations and limitations in the particular jurisdiction in which it has been adopted. It is worthy of notice that the early English cases, upon which the American doctrine was founded, have, in England, been discredited and overruled, by later decisions, so that they are not at the present time authorities upon the question in that country.

English Rule.—In England, the rule is well settled that a third person cannot sue upon a promise made for his benefit, where he is a stranger both to the promise and to the consideration: *Crow v. Rogers*, 1 Strange, 592; *Price v. Easton*, 4 Barn. & Adol. 433. There are some old English cases in which it is held that a stranger to the consideration of a contract may maintain an action upon it if he stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration. *Dutton v. Poole*, 2 Lev. 210, seems to be the most prominent of these cases. Here a son promised his father to pay one thousand pounds to his sister, in consideration of the father's forbearing to sell a certain wood, which the father intended doing to raise a portion for his daughter. It was held that the daughter might sue upon this promise for her benefit, since "there was such apparent consideration of affection from the father to his children, for whom Nature obliges him to provide, that the consideration and promise to the father may well extend to the children." In a case cited in *Bourne v. Mason*, 1 Vent. 6, it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to pay her a certain sum of money if he performed a specified cure. These early cases have been overruled and are not now the law in England. In *Tweddle v. Atkinson*, 1 Best & S. 393, where these cases were directly overruled, the court said: "The modern cases show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that

*REFERENCE TO MONOGRAPHIC NOTES.

Promise for the benefit of a third person: 39 Am. St. Rep. 531-535; 9 Am. Dec. 155-157; 3 Am. Dec. 305-307.

a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued." These early cases were again repudiated in *Gandy v. Gandy*, 30 Ch. Div. 57. The English courts recognize one exception to the doctrine that a third party can have no right of action upon a contract to which he is not a party. "If the contract, although in form it is with A, is intended to secure some benefit to B, so that B is entitled to say he has a beneficial right as cestui que trust under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract": *Gandy v. Gandy*, 30 Ch. Div. 57. Whether an enforceable trust has been created is a question of interpretation: See *Murray v. Flavell*, 25 Ch. Div. 89, where it was held that the agreement created a trust, and in *re Rotherham Alum etc. Co.*, 25 Ch. Div. 103, where the contrary was held. In the latter case it was stated that a mere agreement between A and B that B shall pay C gives C no right of action against B, and in such a case there is no difference between equity and common law.

English Rule in America.—The English rule is recognized in but few of the United States, and, in some of these, exceptions have been grafted upon it. The states recognizing the English rule in some form are Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont, Virginia, and Wyoming. In Michigan, the doctrine is well established that a promise made by one person to another for the benefit of a third—a stranger to the consideration—will not support an action by the latter. The leading Michigan case is *Pipp v. Reynolds*, 20 Mich. 88. In this case the defendant promised one Ecklin to perform a job of painting for the plaintiffs, which Ecklin had theretofore agreed with the plaintiffs to do for them. The plaintiffs were strangers both to the promise and to the consideration, and the court held that no action would lie. Since this case the rule has been consistently followed: See *Turner v. McCarty*, 22 Mich. 264; *Hicks v. McGarry*, 38 Mich. 667; *Wheeler v. Steuart*, 94 Mich. 445. If a genuine trust is established, it may be enforced in equity: *Linneman v. Moross*, 98 Mich. 178, 39 Am. St. Rep. 528. A grantee is liable in equity, though not at law, to a mortgagee upon a promise to pay a mortgage upon the property conveyed to him: *Crawford v. Edwards*, 33 Mich. 354; *Hicks v. McGarry*, 38 Mich. 667. Michigan also recognizes the right of a third party to sue where a creditor accepts a promisor as his new debtor in place of the original debtor; in other words, where there is a complete novation: *Osborn v. Osborn*, 36 Mich. 48. But a creditor cannot recover from another upon a mere agreement with his debtor to pay his debt: *Edwards v. Clement*, 81 Mich. 513; *Hidden v. Chappel*, 48 Mich. 527.

In Georgia, the question of the right of a third party to sue upon a contract made for his benefit seems to have received scant attention. A recent case, however—*Anstell v. Humphries*, 99 Ga. 408—indicates that the English rule is strictly enforced. In this case H. was interested in certain notes of S. S. delivered the notes to A. for the purpose of A.'s raising money, with the understanding that A. was to pay H. out of their proceeds. It was held that H. was not in privity with, and could not sue, A.

The Wyoming authorities are equally few, but the early case of *McCarteney v. National Bank*, 1 Wyo. 382, seems to establish the English rule in that jurisdiction. In this case it was said that "It is well settled that in no case can a stranger to a contract maintain an action upon it, or for the breach of it, save in the exceptional cases where the promisee was considered merely the agent for the stranger, and where the stranger was regarded as the trustee of the party to whom the promise is made."

Dicta in several New Hampshire cases would seem to indicate that, in that state, a third party might sue upon any promise made for his benefit. Such a case is *Warren v. Batchelder*, 16 N. H. 580. Despite such dicta, however, the only cases in which a third party is given a right of action upon a promise made for his benefit are those in which a debtor places property in the hands of another under a promise from him to pay the debtor's creditor; such third party (creditor) may sue the promisor only in case he accepts such promise in some manner sufficient to discharge his original debtor and substitute as a new debtor the promisor. This is practically a novation, the same as is recognized in Michigan as not coming within the rule that only a party to a contract may sue. This rule was early established in New Hampshire by the case of *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741. In this case A held a claim against an estate, and the executor sold a farm belonging to the estate, and left a portion of the purchase money in the hands of the purchaser B, under an agreement by him to pay A. It was held that A could not sue B, A having never assented to this arrangement prior to his suit, or agreed in any manner to accept B as his debtor, and extinguish his claim against the executor. The essentials required in order to entitle a third party to sue are an acceptance by the third party of the defendant as his debtor, and an extinguishment of the original debt: *Lang v. Henry*, 54 N. H. 57; *Warren v. Batchelder*, 15 N. H. 129; *Warren v. Batchelder*, 16 N. H. 580.

In actions purely at law, Vermont follows the English rule, and holds that the legal interest in a contract is in him to whom the promise is made, and from whom the consideration moves; and he alone, or his legal representative, can maintain an action at law thereon: *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362; *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332. The Vermont court gave early indications of following the English rule, and in *Arlington v. Hinds*, 1 D. Chip. 431, 12 Am. Dec. 704, doubted the soundness of the rule, that a third party might sue upon a contract made for his benefit. In *Crampton v. Ballard*, 10 Vt. 251, is pointed out the absurdity of allowing two distinct parties, at the same time, to sustain an action upon the same contract, and recover for the same, identical thing. In the same case, the court says that the cases in which a third party has been permitted to sustain an action upon a contract "are referable to the heads of 'dormant partners,' 'agents known or secret,' and, where the consideration moves from the party, and he is solely interested in the fulfilment of the contract." *Rutland etc. R. R. Co. v. Cole*, 24 Vt. 33, in which it is said that the person

beneficially interested may sue upon a simple contract, does not extend the Vermont rule, since in this case the party beneficially interested (the plaintiff) had furnished the consideration, and the party in whose name the contract was made was its agent. Where there is a clear substitution of debtors, the third party may sue the new debtor: *Pangborn v. Saxton*, 11 Vt. 79. And, where a court of chancery imposes terms on a party, and such party promises to comply with the terms, the party to be benefited by the terms imposed may sue: *Sampson v. Swift*, 11 Vt. 315. Clearly, where the promise is directly to the third party, he may sue: *Davenport v. North-Eastern Mut. Life Assn.*, 47 Vt. 528. The strict rule has been relaxed so that, where property has been left in the hands of one for sale to pay the proceeds to a third, the third party may sue: *Buck v. Albee*, 27 Vt. 190. This case marks the nearest approach to the general American doctrine in Vermont. A trust may be enforced by a party in whose favor it has been established: *Corey v. Powers*, 18 Vt. 587. A mere incidental benefit, never intended by the parties, naturally could furnish no ground for a suit: *Milton v. Story*, 11 Vt. 101, 34 Am. Dec. 671.

In Virginia, it seems to be settled that, in the absence of statute, a third party has, in general, no right of action upon a promise made for his benefit: *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646. This general rule is subject to the exception that, where the consideration moves from the third party, he may sue. And, where a debtor places money or property in the hands of another as a fund from which the creditor is to be paid, the creditor may maintain an action against the holder of the fund. This liability is placed upon the ground that a trust is created: *Jones v. Thomas*, 21 Gratt. 96. A trust may be enforced in equity: *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Willard v. Worsham*, 76 Va. 392. And a grantee who promises to pay a mortgage upon the property is liable in equity to the mortgagee, but he is not liable in an action at law: *Osborne v. Cabell*, 77 Va. 462; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882. Under a statute authorizing a corporation to borrow money on condition that it would recognize and pay former bonds, it was held that holders of these bonds acquired no right of action against the corporation: *Stuart v. James River etc. Co.*, 24 Gratt. 294.

The Massachusetts courts have been gradually approaching the English view, and now hold a modification of that doctrine. The earlier cases show an inclination to adopt the American rule, but later decisions have limited their application and practically overruled many of their statements. In *Brewer v. Dyer*, 7 Cush. 337, it was stated as a principle of law, "long recognized and clearly established in this commonwealth, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." Chief Justice Shaw seems to have recognized the same rule as thoroughly established in Massachusetts jurisprudence: *Carnegie v. Morrison*, 2 Met. 381, 402. The reason for the rule, as stated in the latter case is, that "the law, operating

upon the acts of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded." The Massachusetts doctrine received its first classification and limitation by Metcalf, J., in *Mellen v. Whipple*, 1 Gray, 317, where it was stated that in Massachusetts there were three distinct classes of cases in which a third party had a right of action upon a contract made for his benefit: 1. The first class consists of those cases in which the defendant has in his hands money or property which in equity and good conscience belongs to the plaintiff, as, where one receives property from another as a fund from which certain creditors of the depositor are to be paid, and promises to pay such creditors. Of this class are *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154; *Carnegie v. Morrison*, 2 Met. 381; *Frost v. Gage*, 1 Allen, 262; *Hall v. Marston*, 17 Mass. 575; *Felch v. Taylor*, 13 Pick. 133; *Fitch v. Chandler*, 4 Cush. 254; *Perry v. Swasey*, 12 Cush. 36; *Putnam v. Field*, 103 Mass. 556. 2. The second class comprises those cases where promises have been made to a father or uncle, for the benefit of a child or nephew. The nearness of the relation between the promisee and him for whose benefit the promise was made, has been sometimes assigned as a reason for these decisions. Of this class is *Felton v. Dickinson*, 10 Mass. 287. 3. The third class consists of cases where the defendant has had the actual use of property of the third party under a legal liability to pay for its use. Of this class is *Brewer v. Dyer*, 7 Cush. 337. In *Field v. Crawford*, 6 Gray, 116, the doctrine was still more limited, by denying a right of action to a third party against the assignee of an insurance policy who was to pay any surplus proceeds of such policy to such third party. And in *Dow v. Clark*, 7 Gray, 198, it was held that a creditor could not maintain an action against the transferee of property, though there was an agreement to pay the debts of the transferrer, where the names and number of the creditors and the amount of their demands were not mentioned. The later cases very generally emphasize the narrow limits of the rule allowing a third party to sue, with a tendency to restrict its application more and more: See *Colburn v. Phillips*, 13 Gray, 64; *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1. In the last case cited, the third class of cases recognized in *Mellen v. Whipple*, 1 Gray, 317, was discredited as not being reconcilable with later authorities. The second class of cases, viz., that a child has a right of action upon a promise made to its father for its benefit, the nearness of relationship furnishing the consideration, was directly overruled in *Marston v. Bigelow*, 150 Mass. 45. The particular case of *Felton v. Dickinson*, 10 Mass. 287, was not overruled, for it appeared in that case that the son actually furnished the consideration, but the broad ground upon which it was decided was discredited as not being sound law, and the court said that the case was not an authority upon the proposition that a son may sue upon a promise made for his benefit to his father. "When it appears that the promise was not made to the son, and that the consideration did not move from him, we can see no reason

why the nearness of the relationship should change the general rule of law that a man cannot sue upon a contract to which he is not a party or privy." In view of the comparatively recent case of *Borden v. Boardman*, 157 Mass. 410, it is difficult to determine whether any exception to the general rule, that only a party to a contract may sue thereon, is recognized in Massachusetts. In this case there existed an agreement between the defendant and another, upon a sufficient consideration, that the defendant would pay, out of funds of the other, placed in his hands for the purpose, a specific sum to the plaintiff, a third party, who was not a party to the agreement, and from whom no consideration moved. There being a debt due to the plaintiff, it would seem that the money held by the defendant did in equity and good conscience belong to the plaintiff, and that the plaintiff should be permitted to sue. And yet the court said, in denying the right to sue, that "it is well settled in this state that no action lies in such a case in favor of such third party to recover the money so held of the party holding it." It would seem that the rule recognized in the first class of cases, as given by Justice Metcalf in *Mellin v. Whipple*, 1 Gray, 317, viz., that the third party may sue where the defendant has in his hands money, which, in equity and good conscience, belongs to him, if not distinctly disapproved, is at least materially limited in its application.

In North Carolina, an early case seemed to indicate a tendency toward the general American doctrine. In this case, *Cox v. Skeen*, 2 Ired. 220, 38 Am. Dec. 691, it was said: "It is true that where an agreement is not under seal, the person for whose sole benefit it is evidently made may sue thereon in his own name, although the engagement be not directly to or with him." And in as recent a case as *Porter v. Richmond etc. R. R. Co.*, 97 N. C. 46, where the defendant promised the city board of aldermen to pay a special policeman if the board would appoint one to act at the defendant's depot, the policeman was permitted to sue the defendant. But here the policeman furnished the consideration, was notified of the agreement, accepted it, and the defendant placed him on its payroll. Naturally, a direct promise to pay could be reasonably inferred. Where, also, a debtor leaves money in the hands of a third person with which to pay his creditor, in accordance with an arrangement with his creditor, such creditor may sue the third person: *White v. Hunt*, 64 N. C. 496; *Strayhorn v. Webb*, 2 Jones, 199, 64 Am. Dec. 580. In the recent case of *Woodcock v. Bostic*, 118 N. C. 822, it was directly laid down that the rule that, at law, a third person may maintain an action upon the promise of one person to another for the advantage and benefit of the third does not prevail in North Carolina. To the same effect, see *Coffey v. Shuler*, 112 N. C. 622; *Peacock v. Williams*, 98 N. C. 324; *Morehead v. Wriston*, 73 N. C. 398. But in *Haun v. Burrell*, 119 N. C. 544, the court said that the question had never been decided in North Carolina, and the same opinion was given in a more modified form in *Sam v. Price*, 119 N. C. 572. But in a very recent case, *Gorrell v. Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, the court held that

a citizen and tax-payer had a right of action against a water company by reason of damage by fire caused by a failure of the water supply, where the water company contracted with the city to furnish water in sufficient quantity to extinguish fires. The decision seems to be placed, not merely on the ground that the contract was made for the benefit of the tax-payer, but rather upon the ground that the tax-payer had furnished the consideration of the contract. Though the American doctrine is stated broadly in this case, it is probable, in view of the earlier decisions, that a modified English doctrine will prevail in North Carolina. Even the code provision, allowing actions to be brought in the name of the real party in interest, seems to have had little effect upon contracts of this character.

American Rule—Jurisdictions, Where Held.—The American rule, in general terms, is that a third party has a right of action upon a promise made for his benefit, though he is a stranger, both to the promise and to the consideration. This rule is recognized in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

In Alabama, the rule was early recognized in the case of *Lovely v. Caldwell*, 4 Ala. 684. See, also, *Shotwell v. Gilkey*, 31 Ala. 724; *Potts v. First Nat. Bank*, 102 Ala. 286.

In Arkansas, as in many of the states, there seems to have been but little litigation upon the question, but the rule is well recognized: *Chamblee v. McKenzie*, 31 Ark. 155; *Talbot v. Wilkins*, 31 Ark. 411; *Hecht v. Caughron*, 46 Ark. 132.

An early case in California—*McLaren v. Hutchinson*, 18 Cal. 80—indicated a tendency to deny the rule. In fact, the right of action was denied because there was no privity between the parties, though in a previous case—*Kreutz v. Livingston*, 15 Cal. 344—where money was received in trust to be paid to a third person, it was held that he might sue. The doctrine of *McLaren v. Hutchinson* was questioned in *Lewis v. Covillaud*, 21 Cal. 178, where the general American rule was recognized, and since that time the general rule has been well established. The rule, however, has not been very widely extended in California, even under the provision of section 1559 of the Civil Code, which authorizes a third party to sue upon a contract made for his benefit: See *Chung Kee v. Davidson*, 73 Cal. 522; *Buckley v. Grey*, 110 Cal. 339, 52 Am. St. Rep. 88; *Savings Bank v. Thornton*, 112 Cal. 255; *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203.

In Colorado, a third party for whose benefit a contract has been entered into, may not only maintain an action thereon in his own name, but he may plead it by way of set off: *Green v. Richardson*, 4 Colo. 584; *Lehow v. Simonton*, 3 Colo. 346; *Green v. Morrison*, 5 Colo. 18.

Connecticut recognized the right of a third party for whose bene-

fit an agreement was made to sue in chancery in *Crocker v. Higgins*, 7 Conn. 342. The right to sue at law was admitted in *Treat v. Stanton*, 14 Conn. 445, but only in cases where the third party had the sole and exclusive beneficial interest in the subject of the promise. Requiring the third party to have the sole and exclusive beneficial interest has resulted in whittling away the rule almost to nothing: See *Clapp v. Lawton*, 31 Conn. 95; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Steene v. Aylesworth*, 18 Conn. 244, and the principal case.

In Delaware, the rule is recognized: *Farmers' Bank v. Brown*, 1 Harr.(Del.) 330. The rule in Florida seems to be slightly limited in its application: *Wright v. Terry*, 23 Fla. 160; *Hunter v. Wilson*, 21 Fla. 250.

The American rule in its essential features is recognized in Illinois: *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 Ill. 88; *Bristow v. Lane*, 21 Ill. 194; *Ball v. Benjamin*, 56 Ill. 105; *Snyderacker v. Magill*, 24 Ill. 138; *Steele v. Clark*, 77 Ill. 471; *Thompson v. Dearborn*, 107 Ill. 87; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Boals v. Nixon*, 26 Ill. App. 517; *Cobb v. Heron*, 180 Ill. 49. The rule has its limitations, however, and where, upon the formation of a partnership, the firm agrees to perform a contract of one of its members, the firm is not liable to the third party interested: *Goode-now v. Jones*, 75 Ill. 48.

The earliest Indiana case shows a leaning in favor of the American doctrine: *Harper v. Ragan*, 2 Black. 39. But in *Eastman v. Ramsey*, 3 Ind. 420, the right was denied to a creditor to sue upon a promise made for his benefit. This case, while not cited, seems to be discredited in *Nelson v. Hardy*, 7 Ind. 364, and a promise by one to a debtor to pay his creditor was held to be actionable by the creditor. And in *Day v. Patterson*, 18 Ind. 114, the court said it was settled in Indiana that a third party might sue on a promise made to another for his benefit. In *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671, the distinction seems to be recognized that a promise by one to pay another's debt may be enforced in equity by a third party, but it cannot be enforced at law until the third party has accepted it. And, while this rule, that, in the absence of an acceptance, the third party must enforce his rights in equity, seems to be established in Indiana, the distinction is of little moment in view of the fact that the systems of law and equity are now blended: *Miller v. Billingsly*, 41 Ind. 489; *Stevens v. Flanagan*, 131 Ind. 122; *Carnahan v. Tousey*, 93 Ind. 561. Bringing suit is sufficient acceptance: *Copeland v. Summers*, 138 Ind. 219. But see *Campbell v. Patterson*, 58 Ind. 66; *Helms v. Kearns*, 40 Ind. 124; *Redelsheimer v. Miller*, 107 Ind. 485; *Boruff v. Hudson*, 138 Ind. 280.

In Iowa, the rule was early recognized and has been maintained ever since: *Johnson v. Collins*, 14 Iowa, 63; *Rice v. Savery*, 22 Iowa, 470; *Johnson v. Knapp*, 36 Iowa, 616; *Phillips v. Van Schaick*, 37 Iowa, 229; *German Sav. Bank v. Northwestern Water etc. Co.*, 104 Iowa, 717.

The supreme court of Kansas, speaking through Justice Brewer,

first laid down the rule in *Anthony v. Herman*, 14 Kan. 494. The limitations of the doctrine were stated in *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541. See *Mumper v. Kelley*, 43 Kan. 256; *Hardesty v. Cox*, 53 Kan. 618.

The earliest Kentucky case, *Triplett v. Helm*, 5 J. J. Marsh. 651, questions the existence of such a rule. But later, in *Smith v. Lewis*, 3 B. Mon. 229, the rule is recognized. And in *Allen v. Thomas*, 3 Met. 198, 77 Am. Dec. 169, the rule that a third party may sue upon a contract, made for his benefit is recognized as well established: See *Lucas v. Chamberlain*, 8 B. Mon. 276; *Mize v. Barnes*, 78 Ky. 506; *Paducah Lumber Co. v. Paducah etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536.

Louisiana, following the civil law, permits an action by a third party upon a contract made for his benefit. While the ancient Roman law allowed no such action, this was later changed, and this change is recognized in the codified laws of Louisiana: *Mayor v. Bailey*, 5 Martin, O. S., 321; *Duchamp v. Nicholson*, 2 Martin, N. S., 672; *Marigny v. Remy*, 3 Martin, N. S., 607, 15 Am. Dec. 172; *St. Joseph's Assn. v. Magnier*, 16 La. Ann. 338.

The American rule is well established in Maine: *Dearborn v. Parks*, 5 Greenl. 81, 17 Am. Dec. 206; *Hinckley v. Fowler*, 15 Me. 285; *Warren Academy v. Starrett*, 15 Me. 443; *Maxwell v. Haynes*, 41 Me. 559; *Coffin v. Bradbury*, 89 Me. 476.

Maryland recognizes the American doctrine within certain limits: *Owings v. Owings*, 1 Har. & G. 484; *Eichelberger v. Murdock*, 10 Md. 373, 69 Am. Dec. 140; *McNamee v. Withers*, 37 Md. 171; *Seigman v. Hoffacker*, 57 Md. 321.

In Minnesota, the American rule has been recognized from an early date: *Sanders v. Classon*, 13 Minn. 379; *Hawley v. Wilkinson*, 18 Minn. 525; *Follansbee v. Johnson*, 28 Minn. 311. The limits of the doctrine were stated in *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618; *Union Ry. etc. Co. v. McDermott*, 53 Minn. 407, and *Greenwood v. Sheldon*, 31 Minn. 254.

The American rule prevails in Mississippi: *Sweatman v. Parker*, 49 Miss. 19; *Lee v. Newman*, 55 Miss. 365.

The earliest Missouri case—*Thornton v. Smith*, 7 Mo. 86—indicated a tendency to apply the strict rule that only the parties to an agreement may sue thereon. This tendency did not prevail, however, as shown by *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125. There must be a valuable consideration for the promise between the original parties to the contract: *Jones v. Miller*, 12 Mo. 408. In *Page v. Becker*, 31 Mo. 466, the rule was said not to apply to a promise by a vendee to pay a mortgage debt. This holding has been reversed, however: *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685. The promise to pay to a third party may be implied from the circumstances: *Gibson v. St. Louis etc. Ry. Co.*, 76 Mo. 549. See, further, *Schuster v. Kansas City etc. R. R. Co.*, 60 Mo. 290; *Meyer v. Lowell*, 44 Mo. 328; *Ellis v. Harrison*, 104 Mo. 270; *Duerre v. Ruediger*, 65 Mo. App. 407.

The general American rule was recognized in Nebraska in *Shamp v. Meyer*, 20 Neb. 223, though in an earlier case—*Cooper v. Foss*, 15

Neb. 515—it had been held that a vendee who had purchased property, under a promise to pay a mortgage thereon, was liable to the mortgagee: See *Kaufman v. United States Nat. Bank*, 31 Neb. 661; *Chicago etc. R. R. Co. v. Bell*, 44 Neb. 44; *Hare v. Murphy*, 45 Neb. 809.

Nevada recognizes the general American doctrine: *Ruhling v. Hackett*, 1 Nev. 360; *Bishop v. Stewart*, 13 Nev. 25; *Miliani v. Tog-nini*, 10 Nev. 133.

Most of the cases which have arisen in New Jersey, involving the right of a third party to sue upon a contract made for his benefit, have been in equity and not at law. The right to sue in equity to enforce a promise made for one's benefit is recognized, though it seems that the promise must have been made by some one who had authority to make it on behalf of the party suing: *Van Dyne v. Vreeland*, 11 N. J. Eq. 370. See *Price v. Trusdell*, 28 N. J. Eq. 200; *Sell v. Steller*, 53 N. J. Eq. 397. The right of action at law is also recognized: *Joslin v. New Jersey Car etc. Co.*, 36 N. J. L. 141.

New York was the first state to adopt the rule, that a third party may maintain an action upon a promise made for his benefit, and it is from New York that most of the states derive their authorities sustaining the doctrine. The limitations upon the New York doctrine will be noticed under appropriate heads, as will those of other states, and only a general view of the rule will be treated here. The first New York case upon the subject is *Schemerhorn v. Vanderheyden*, 1 Johns. 139. 3 Am. Dec. 304, and while the rule is recognized by this case, what is said upon the question is dicta, for the case was decided upon another point. The leading New York case, in which the question was thoroughly discussed, is *Lawrence v. Fox*, 20 N. Y. 268. In this case the plaintiff was the creditor of H., who loaned a sum of money to the defendant, upon the defendant's promise to pay it to the plaintiff. It was held that the action would lie. In *Davis v. Morris*, 36 N. Y. 569, where a lessee and his assignee agreed that the income from the property should be applied to certain uses, the paying of the rent being one, it was held that the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, did not apply and the lessor had no action against the assignee, since there was no agreement to pay to him. An agreement to assume the debts of another must be supported by a consideration, in order that an action thereon may be brought by a creditor: *First Nat. Bank v. Chalmers*, 39 Hun, 468. See *Claffin v. Ostrom*, 54 N. Y. 581; *Weston v. Barker*, 12 Johns. 276, 7 Am. Dec. 319; *Litchfield v. Flint*, 104 N. Y. 543; *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508; *Clark v. Howard*, 150 N. Y. 232. No action lies upon the promise, where it is void as between the promisor and promisee: *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617. See, as to general limitations upon the New York doctrine, *Wheat v. Rice*, 97 N. Y. 296; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195. The tendency in New York is to restrict the application of the doctrine: *Buchanan v. Tilden*, 5 App. Div. 354. This case was reversed in 158 N. Y. 109, 70 Am. St. Rep. 454, without, however, modifying this tendency.

North Dakota recognizes the American rule, both in its decisions

and by statute: *Parlin v. Hall*, 2 N. Dak. 473; *Dakota Comp. Laws*, 1887, sec. 3499.

Ohio has adopted the American rule: *Thompson v. Thompson*, 4 Ohio St. 333; *Society of Friends v. Haines*, 47 Ohio St. 423; *Cincinnati etc. R. R. Co. v. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700.

Oregon recognizes the rule: *Baker v. Eglin*, 11 Or. 333; *Chrisman v. State Ins. Co.*, 16 Or. 283. But the doctrine has been greatly limited in its application: *Washburn v. Interstate Inv. Co.*, 26 Or. 436; *Brower Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep. 807.

In Pennsylvania, the rule was recognized as early as 1833 in the case of *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107, where the defendant promised to pay a debt in consideration of an assignment for the benefit of creditors. There must be a promise to pay the third party: *Morrison v. Beckey*, 6 Watts, 349. The third party must at least have been the meritorious cause of the consideration: *Edmundson v. Penny*, 1 Pa. St. 334, 44 Am. Dec. 137. The early cases seem to indicate that an actual fund must be created, or the third party has no action: *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458. The case of *Ayer's Appeal*, 28 Pa. St. 179, does not seem to recognize this as essential. But later cases seem to sanction the strictness of the early rule. The question will be discussed under a later head. A creditor cannot sue the promisor, if the promisor is under a liability to be sued by the debtor. Pennsylvania holds that it is unjust that the promisor should be under such a double liability: *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458; *Guthrie v. Kerr*, 85 Pa. St. 303; *Adams v. Kuehn*, 119 Pa. St. 76. As indicating the confined limits of the rule, that a creditor may sue upon a contract made for his benefit, see *Adams v. Kuehn*, 119 Pa. St. 76; *Delp v. Brewing Co.*, 123 Pa. St. 42; *Robertson v. Reed*, 47 Pa. St. 115; *Pugh v. Powell (Pa.)*, 11 Atl. Rep. 570. As indicating a more liberal tendency under other circumstances, see *Hostetter v. Hollinger*, 117 Pa. St. 606; *Keim v. Taylor*, 11 Pa. St. 163; *Merriman v. Moore*, 90 Pa. St. 78.

Rhode Island and South Carolina both recognize the rule: *Urquhart v. Brayton*, 12 R. I. 169; *Wood v. Moriarty*, 15 R. I. 518; *Wilbur v. Wilbur*, 17 R. I. 295. The early South Carolina cases are in point: *Duncan v. Moon*, Dudley, 332; *Brown v. O'Brien*, 1 Rich. 268, 44 Am. Dec. 254; *Thompson v. Gordon*, 3 Strob. 196.

An early Tennessee case adopts the broad doctrine: *McCarty v. Blevins*, 5 Yerg. 195, 26 Am. Dec. 262; *Robinson v. Denson*, 3 Head, 394. Texas has adopted the American rule: *McCown v. Schrimpf*, 21 Tex. 22, 73 Am. Dec. 221; *Urquhart v. Ury*, 27 Tex. 7; *Mathonican v. Scott*, 87 Tex. 396; *Stadler v. Talley*, 3 Tex. Civ. App., sec. 472; *Heath v. Coreth*, 11 Tex. Civ. App. 91. The rule and its limitations as recognized in Utah are well stated in *Montgomery v. Rief*, 15 Utah, 495.

By statute in West Virginia, a third party may sue on a contract made for his sole benefit: *Johnson v. McClung*, 26 W. Va. 659.

The Wisconsin courts have adopted a liberal construction of the American rule: *Hodson v. Carter*, 3 Pinn. 212; *Bassett v. Hughes*, 43 Wis. 319; *Hollock v. Parcher*, 52 Wis. 393; *Grant v. Diebold Safe etc. Co.*, 77 Wis. 72; *Larson v. Cook*, 85 Wis. 564.

American Rule—The Reasons for It.—Every phase of the question of the right of a third party to sue upon a contract made for his benefit has been so thoroughly discussed in New York that the decisions of this state furnish a good starting point from which to consider the doctrine. Neither the reason for the rule, nor its essential elements, were touched upon in the earliest New York case, which enunciated the doctrine: *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304. There is great diversity of opinion as to what the real basis of the rule is, and at least five different grounds have been mentioned upon which the rule, in some of its phases, is supposed to rest. All of these grounds are to be found in the New York decisions, and the New York rule seems not to have settled upon any one of the grounds as a firm foundation. Some of these grounds are recognized elsewhere, and, as will be seen later, the same state will often recognize several different grounds as the basis of the doctrine, depending upon the state of facts to which the doctrine is applied. The rule has been variously stated as resting upon: 1. A trust relationship; 2. The equitable right of subrogation; 3. Agency; 4. Privity of contract by substitution; and 5. The broad equity of the transaction. The earlier New York cases seem to uphold the theory that a trust is created, and in many cases an actual trust relation does exist, since it is possible for one to accept and hold property in trust for the benefit of another: *Weston v. Barker*, 12 Johns. 276, 7 Am. Dec. 319; *Neilson v. Blight*, 1 Johns. Cas. 205; *Berry v. Mayhew*, 1 Daly, 54.

The trust doctrine was prevalent, particularly in the earlier cases in all the states: *Kreutz v. Livingston*, 15 Cal. 345; *Crocker v. Higgins*, 7 Conn. 342; *Eddy v. Roberts*, 17 Ill. 505; *Steele v. Clark*, 77 Ill. 471; *Beals v. Beals*, 20 Ind. 163; *Rice v. Savery*, 22 Iowa, 470; *Owings v. Owings*, 1 Har. & G. 484; *Urquhart v. Brayton*, 12 R. I. 169. Some of the states even now hold the trust doctrine as the basis of the rule, and in a few cases this seems to be the reason for the limited extent of the doctrine: *Follansbee v. Johnson*, 28 Minn. 311; *Greenwood v. Sheldon*, 31 Minn. 254; *Adams v. Kuehn*, 119 Pa. St. 76. But see *Heath v. Coreth*, 11 Tex. Civ. App. 91; *Chung Kee v. Davidson*, 102 Cal. 188; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654. In speaking of this doctrine, the supreme court of Mississippi said in *Lee v. Newman*, 55 Miss. 365: "Especially will this right to bring suit in his own name exist in behalf of him for whose benefit the promise was made, where the consideration of it was money or property simultaneously delivered or sold to the promisor. In such case, the property is received under a trust, which will itself form a good consideration, inuring to the benefit of him to whom the payment is due; and, if the purchaser has received credit for the sum thus contracted to be paid to such other person, the law will treat it as money had and received to his use." There are, obviously, cases to which the trust doctrine, more than any other, is applicable, as was pointed out in *Montgomery v. Rief*, 15 Utah, 495. A real trust is not the normal case, however, of a promise by one for the benefit of a third party. And it was pointed out in *Lawrence v. Fox*, 20 N. Y. 268, that the

rule has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to them.

The doctrine of the equitable right of subrogation seems to exist only in the case of mortgages, where the grantee of the mortgagor covenants to pay the mortgage debt. In such a case, the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. It is not enforced as a promise by the grantee to the mortgagee, but as a promise by the grantee to the mortgagor, which promise the mortgagee is equitably entitled to enforce: *Blyer v. Monholland*, 2 Sand. Ch. 478; *Halsey v. Reid*, 9 Paige, 446; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440. The rule, however, has outgrown this limitation, and it has been pointed out that since it has been settled that the promise of the grantee brings him into privity with the mortgagee, there is no reason for invoking the doctrine of equitable subrogation: *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508. The extension of the rule to other facts and situations, renders the doctrine of equitable subrogation a wholly insufficient basis. This doctrine has been applied even in those states which deny the right of a third party to sue upon a promise made for his benefit: See *Crawford v. Edwards*, 33 Mich. 354; *Hicks v. McGarry*, 38 Mich. 667. The right acquired in such a case is enforceable only in equity, however.

The doctrine of agency was deemed to be the real foundation for the rule by two of the concurring judges in the leading case of *Lawrence v. Fox*, 20 N. Y. 268. But in *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508, Judge Finch pointed out that the idea of an agency was a legal fiction, having no warranty in the facts: See *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195. Agency has been frequently recognized as the real basis of the rule: *White v. Mastin*, 38 Ala. 147; *Treat v. Stanton*, 14 Conn. 445; *Rice v. Savery*, 22 Iowa, 470; *Owings v. Owings*, 1 Har. & G. 484; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *Hubbert v. Borden*, 6 Whart. 79; *Urquhart v. Brayton*, 12 R. I. 169. It was said in *Johnson v. Collins*, 14 Iowa, 63, that the promisee becomes the agent of the third party after the adoption by him of the contract made for his benefit, though he is a stranger to the consideration.

The tendency, from the earliest cases, has been to establish a privity between the third person, for whose benefit the promise is made, and the promisor. The opinion in *Lawrence v. Fox*, 20 N. Y. 268, is based directly upon this ground. The court, quoting from the Massachusetts case of *Brewer v. Dyer*, 7 Cush. 337, said that the rule "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." Again, in *Vrooman v. Turner*, 69

N. Y. 280, 25 Am. Rep. 195, it was said that "a legal obligation or duty of the promisee to him [third party], will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor": See *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582; *Litchfield v. Flint*, 104 N. Y. 543; *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508. The finding of a privity and the implying of a promise form the real basis on which the action of a third party is founded, and this is true in most of the states, including those which in some cases seek to base the doctrine upon a trust or an agency: See *Huckabee v. May*, 14 Ala. 263; *Chung Kee v. Davidson*, 102 Cal. 188; *Steele v. Clark*, 77 Ill. 471; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Johnson v. Collins*, 14 Iowa, 63; *German S. Bank v. Northwestern W. Co.*, 104 Iowa, 717; *Bohanan v. Pope*, 42 Me. 93; *McNamee v. Withers*, 37 Md. 171; *Kaufman v. United States Nat. Bank*, 31 Neb. 661; *Urquhart v. Brayton*, 12 R. I. 169; *Brown v. O'Brien*, 1 Rich. 268, 44 Am. Dec. 254; *Montgomery v. Rief*, 15 Utah, 495.

The idea that the action of a third party is founded upon the equity of the transaction is more of a suggestion than anything more substantial. No decision on such a ground has yet been made, though with the tendency to disregard legal fictions and to base decisions upon realities, such a suggestion is likely to become of more importance: See *Gifford v. Corrigan*, 105 N. Y. 223, and the same case on the second appeal reported in 117 N. Y. 257, 15 Am. St. Rep. 508.

American Rule—Its Elements.—The elements necessary to constitute the rule seem to have grown up long after the rule itself was recognized. The necessity for analyzing the rule to determine its constituent elements arose from the desire of litigants to extend its application on the one hand, and, on the other, the necessity for the courts to place the rule itself upon some substantial legal basis. It was early recognized that it is not every contract for the benefit of a third party that is enforceable by the beneficiary. In New York, it finally came to be recognized that the rule was made up of two elements: 1. There must be an intent to benefit the third party; and 2. The promisee must owe some obligation to the third party. If both of these elements do not exist, the third party has no right of action upon the contract. That these two elements must exist was settled in New York by the case of *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, where the court said: "To give a third party, who may derive a benefit from the performance of the promise, an action, there must be: 1. An intent by the promisee to secure some benefit to the third party; and 2. Some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." Continuing, the court said: "It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking; neither is it necessary that the

latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

As recognizing the necessity of the presence of both of these elements, see *Townsend v. Rackham*, 143 N. Y. 516; *Coleman v. Hiler*, 85 Hun, 547; *Embler v. Hartford Steam etc. Ins. Co.*, 158 N. Y. 431; *Durnherr v. Rau*, 135 N. Y. 219; *Litchfield v. Flint*, 104 N. Y. 543; *Lorillard v. Clyde*, 122 N. Y. 498. Where the relationship existing between the promisee and the third party is that of parent and child, there is a sufficient duty from the parent to his child to bring the case within the rule. *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Buchanan v. Tilden*, 5 App. Div. 354; *Knowles v. Erwin*, 43 Hun, 150. As to the benefit required, see *Garnsey v. Rodgers*, 47 N. Y. 233, 7 Am. Rep. 440; *Lawrence v. Fox*, 20 N. Y. 268; *Turk v. Ridge*, 41 N. Y. 201; *Merrill v. Green*, 55 N. Y. 270. The debt or obligation need not, however, be in existence at the time the promise is made: *Coster v. Mayor*, 43 N. Y. 399; *Little v. Banks*, 85 N. Y. 258; *Riordan v. First Presby. Church*, 26 N. Y. Supp. 38, 6 Misc. Rep. 84.

In all of the states it is recognized that there must be a clear intent to benefit the third party, though most of them do not go as far as the Connecticut court and hold that the contract must be for the sole and exclusive benefit of the third party: *Treat v. Stanton*, 14 Conn. 445; *Crocker v. Higgins*, 7 Conn. 342; and the principal case. As favoring a strict rule, see *German Sav. Bank v. Northwestern etc. Co.*, 104 Iowa, 717. See, generally, *Thomas Mfg. Co. v. Prather*, 65 Ark. 27; *Chung Kee v. Davidson*, 73 Cal. 522; *Savings Bank v. Thornton*, 112 Cal. 255; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; *Holderman v. Tedford*, 7 Kan. App. 657, 53 Pac. Rep. 887; *Paducah Lumber Co. v. Paducah etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536; *Howsmon v. Trenton etc. Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618; *Chicago etc. R. R. Co. v. Bell*, 44 Neb. 44; *Joslin v. New Jersey Car etc. Co.*, 36 N. J. L. 141; *Cincinnati etc. R. R. Co. v. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700; *Parker v. Jeffrey*, 26 Or. 186; *Ayer's Appeal*, 28 Pa. St. 179; *Urquhart v. Brayton*, 12 R. I. 169; *Thompson v. Gordon*, 3 Strob. 196; *Urquhart v. Ury*, 27 Tex. 7; *Montgomery v. Rief*, 15 Utah, 495; *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629; *Grant v. Diebold Safe etc. Co.*, 77 Wis. 72.

Since the elements of the doctrine have not been recognized until long after the rule itself has become established, it follows that in many of the states an analysis of the rule has never been made, and to what limits the rule would be extended is doubtful. Wherever the necessity for determining what the elements of the rule are has arisen, the New York cases have been very largely followed, and the necessity of finding some obligation on the part of the promisee toward the third party has been insisted upon. This was true in Arkansas, the two elements constituting the rule not being

clearly recognized until the recent case of *Thomas Mfg. Co. v. Prather*, 65 Ark. 27. The Illinois courts seem to deny the necessity of an obligation from the promisee to the third party: *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467. The second element of the rule was recognized in Iowa in the case of *German Sav. Bank v. Northwestern etc. Co.*, 104 Iowa, 717. As admitting the necessity of some obligation resting upon the promisee toward the third party, see *Union Ry. etc. Co. v. McDermott*, 53 Minn. 407; *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618; *Howsmon v. Trenton W. Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *St. Louis v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695; *Street v. Goodale*, 77 Mo. App. 318; *Devers v. Howard*, 144 Mo. 671; *Grant v. Diebold Safe etc. Co.*, 77 Wis. 72; *Montgomery v. Rief*, 15 Utah, 495; *Ferris v. Carson etc. Co.*, 16 Nev. 44. Ohio seems not to require the existence of an obligation on the part of the promisee to the third party, the court saying, in *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436, that it is sufficient if the contract between the parties themselves is supported by a sufficient consideration. Pennsylvania holds the same rule, at least so far as a vendee of property is concerned who promises to pay the purchase price to a third person, the courts holding that it is wholly immaterial to a purchaser of property to whom he pays the money, and, if the third party is to receive it, he may sue for its recovery: *Merriman v. Moore*, 90 Pa. St. 78. But see *Edmundson v. Penny*, 1 Pa. St. 334, 44 Am. Dec. 137, where it is said that a party must be the "meritorious cause" of the consideration or he cannot sue. In Oregon, an obligation is necessary, but the courts seem to go farther and require that the contract as between the immediate parties must be executed; a mere executory promise to pay the debt of another, without the placing of money in the promisor's hands, is not sufficient: *Washburn v. Investment Co.*, 26 Or. 436. No obligation seems necessary in Tennessee: *McCarty v. Blevins*, 5 Yerg. 195, 26 Am. Dec. 262. Minnesota recognizes near relationship as a substitute or an equivalent for obligation: *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618. But in Rhode Island a note given to a grandchild for love and affection is not such an obligation of a promisee as will give an action to a third party upon the promise: *Wilbur v. Wilbur*, 17 R. I. 295. In Kentucky, it is doubtful whether a duty from the promisee to the third party is necessary, judging from the language of the court in *Paducah etc. Co. v. Paducah etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536.

Notwithstanding some apparent language to the contrary in *Fallow v. Kemp*, 7 Blackf. 544, it seems that the Indiana courts do not recognize the necessity of an obligation on the part of the promisee to the third party. Having reaped the fruits of a promise, the party cannot escape the liability imposed by such promise: *Gwaltney v. Wheeler*, 26 Ind. 415; *Lamb v. Donovan*, 19 Ind. 40; *Walz v. Walz*, 84 Ind. 403. The question appears not to have been very thoroughly discussed in Indiana as yet.

The Connecticut courts, while strict in requiring the contract to be made for the sole and exclusive benefit of a third party, do not seem to insist that the promisee shall be under an enforceable obli-

gation to the third party: *New Haven v. New Haven etc. R. R. Co.*, 62 Conn. 252.

American Rule—What Benefit Sufficient.—The cases are unanimous in holding that an incidental or indirect benefit to a third party is not sufficient to give a right of action to him. There must be an intent on the part of the contracting parties that the third party shall be benefited: See *Chung Kee v. Davidson*, 73 Cal. 522; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; *Howsmon v. Trenton etc. Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Simpson v. Brown*, 68 N. Y. 355; *Parker v. Jeffery*, 26 Or. 186. It is, however, a question of construction as to whether the parties intended by their contract primarily to benefit a third party, and the courts vary in their interpretation of contracts which benefit third parties. If D., on a good consideration, promises W. to pay a sum of money on a note made by W. and C. as his security, to a third party, C. has no right of action against D., upon the failure of the latter to perform his promise to W. The benefit is merely incidental: *Carter v. Darby*, 15 Ala. 696, 50 Am. Dec. 156. In *Hecht v. Caughron*, 46 Ark. 132, where millowners agreed to carry on their business for the sole benefit and in the name of certain merchants until their debt to the merchants was liquidated, the merchants agreeing to pay all expenses of the business, including the employés' wages—it was held that an employé could bring suit against the merchants on the contract. But in *Chung Kee v. Davidson*, 73 Cal. 522, where certain creditors were to receive the entire "clean-up" from a mine, and out of it to pay all running expenses and the debt due themselves, it was held that the contract was not made for the benefit of the employés of the mine, and no action accrued to them thereon. This case seems to be somewhat weakened by the same case on its second appeal, in 102 Cal. 188, where under the same agreement it was held that, upon the payment of the "clean-up" to the secured creditors, they took it under a trust to apply it to the payment of running expenses, and were liable directly to the laborers employed in the mine to the extent of the amount given them.

In *Wright v. Terry*, 23 Fla. 160, one T. agreed to move the logs of W., and W. agreed to furnish the necessary provisions and money, not to exceed two hundred dollars, to pay off men that might be got rid of. The court held that the agreement was made for the benefit of T., and that a laborer employed had no action against W. In *Rhodes v. Matthews*, 67 Ind. 131, the defendant agreed to furnish a manufacturer means to operate and carry on his business, including the payment of the operatives employed. This agreement was known and acted upon by the operatives, and it was held they could sue the defendant. It has been held that a building contract which permits the owner to retain a per cent. of the contract price until the work is completed is made for the benefit of the owner alone: *Steel v. McBurney*, 96 Iowa, 449. Where the defendant promised to pay the expense of making election boxes, it was held that a carpenter who made the boxes could sue: *Egan v. Thomson*, 57 How. Pr. 324. A promise by one to furnish another

with means to pay his current expenses does not authorize a third person to sue for goods furnished: *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541. Where A. contracted to haul logs for B., who agreed to pay A.'s workmen, D., one of A.'s workmen, could sue B. on the promise: *Bohanan v. Pope*, 42 Me. 93. Where F. borrowed money from the defendant with which to build a house, the money to be held by S., and to be used in buying lumber and material, B., who furnished lumber after being notified of the agreement, could recover for lumber furnished: *Bennett v. Merchantville B. & L. Assn.*, 44 N. J. Eq. 116.

A legatee has no right of action against an attorney for negligently drawing a will so that he did not receive what the deceased intended he should: *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88. In Connecticut, it appears that a property owner who has been damaged by a railroad company may recover from such company upon a contract between the company and the city whereby the company agreed, after proper award, to pay all damages caused by its road: *New Haven v. New Haven etc. R. R. Co.*, 62 Conn. 252. And in *Crocker v. Higgins*, 7 Conn. 342, it was held that where a vendee of real property promised to give a life lease to a third party, the third party could enforce the promise.

An agreement among partners, after the formation of the partnership, to perform a contract of one of the partners, is not made for the benefit of an outside party: *Goodenow v. Jones*, 75 Ill. 48. And in *Lennon v. Lyon*, 50 N. Y. Supp. 763, 22 Misc. Rep. 505, where one partner agreed with a committee of his partner's estate to pay all partnership debts, and indemnify the committee against loss from the claims of firm creditors, it was held that a firm creditor could not maintain an action upon the agreement, in the absence of proof that the contract was made for his benefit. But where a firm had authorized a bank to advance money to a buyer, and it would honor the bank's drafts, and a new firm was formed, a member writing to the buyer that the old arrangement would be continued, which letter was shown to the bank, it was held that the firm was liable to the bank for money advanced: *First Nat. Bank v. Rowley*, 92 Iowa, 530.

In *Crandall v. Payne*, 154 Ill. 627, where a vendee of property was to pay one thousand dollars of the purchase price to a third party, it was held that the third party was only incidentally benefited by the agreement, and could not sue on it: *Contra, Merriman v. Moore*, 90 Pa. St. 78.

Since the benefit to the third party must be the consideration of the contract, a penal obligation cannot be stipulated for the benefit of such a person: *St. Joseph's Assn. v. Magnier*, 16 La. Ann. 338.

A railroad employé, who becomes a member of a relief department organized by the railroad, and who agreed that if he received benefits from the relief department for injuries received it would operate as a release of such employé's claim against the railroad, cannot sue the railroad company after he has received benefits; the contract is made for the benefit of the railroad company, and it can take advantage thereof: *Chicago etc. R. R. Co. v. Bell*, 44 Neb. 44.

An agreement of a vendee that he would erect his house twelve

feet from the line of the street, and that the vendors, in case of any further conveyances of lots on that street, would stipulate with the purchasers that the houses to be erected should be so erected that the main front wall should be on a line twelve feet from the line of the street, will be enforced in equity as against a subsequent grantee with notice: *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206. And where a person granted the right of way over his land to a railroad company, expressly stipulating that the company "shall erect and maintain such crossings as may be necessary to the accommodation of persons whose lands are divided by said track," the grantee of such grantor may have an action in his own name against the company for a failure to maintain crossings: *Willenborg v. Illinois Cent. R. R. Co.*, 11 Ill. App. 298. See, also, *Jordan v. Brown*, 56 Iowa, 281.

One who indorses on an execution a promise to pay the debt and costs is liable to the plaintiff in execution upon the promise: *Hinman v. Moulton*, 14 Johns. 466. A promise by a receiver to an officer who was levying on property, that he would pay the judgment out of the proceeds of the property if the receiver were allowed to sell it, can be sued upon by the plaintiff in execution: *Becker v. Torrance*, 31 N. Y. 631. Contra, *Cummings v. Klapp*, 5 Watts & S. 511.

Where a sublessee agrees to pay rent out of the income from the property, the original lessor has no right of action against him, since there is no agreement to pay to him, the agreement merely determining what application shall be made of a sum of money belonging to the parties to the contract: *Davis v. Morris*, 36 N. Y. 569; *Martin v. Graham*, 17 N. Y. Supp. 710. 63 Hun, 628.

Where two persons have made a contract involving a promise by one for the benefit of a third person, such third person may be heard to defend such contract against an attack for fraud: *Goos v. Goos* (Neb., 1898), 77 N. W. Rep. 687.

If A pay money to B for the use of C, to whom he is not indebted, by mistake, intending to have paid it for the use of D, to whom he owed it, D has no right of action for the money: *Wilson v. Greer*, 7 Humph. 513. Also, where a vendee agreed to assume the payment of a lien upon the lot purchased, but by mistake the wrong lot was transferred, upon which there was also a lien, the lienholder on the lot conveyed had no action: *Heath v. Coreth*, 11 Tex. Civ. App. 91.

An agreement by an employer to furnish medical attendance to his employé, in case of accident, is not a contract made for the benefit of a physician, who, at the employé's instance, subsequently rendered professional services to him, and the physician cannot sue thereon: *Thomas Mfg. Co. v. Prather*, 65 Ark. 27. But where a physician continued to visit a patient after being shown a telegram wherein the defendant promised to pay for all necessary medical attendance, the physician may recover: *White v. Mastin*, 38 Ala. 147. But see *Canney v. South Pacific C. R. R. Co.*, 63 Cal. 501. where the question does not seem to have been squarely raised. One who is insured may sue on a contract of reinsurance, though not a party to the agreement: *Glen v. Hope Mut. etc. Ins. Co.*, 56 N. Y. 379; *Fischer v. Hope Mut. etc. Ins. Co.*, 69 N. Y. 161; *Johannes v.*

Phoenix Ins. Co., 66 Wis. 50, 57 Am. Rep 249. As holding that the contract of reinsurance must promise to pay the insured in order to sustain the action, see Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438.

American Rule—Benefit Derived from Contract of Surety.—In New York, the tendency is not to hold obligors liable to third parties, the third parties not being the principal ones to be benefited. So where, upon the dissolution of a firm, one partner executes to another a bond with a surety, conditioned for the payment by the partner executing it of all the firm debts, the liability of the obligors is to the obligee only, not to the firm creditors, and an action cannot be maintained thereon by a firm creditor to recover his indebtedness of the obligors: Merrill v. Green, 55 N. Y. 270; Hurd v. Johnson etc. Co., 34 N. Y. Supp. 915, 13 Misc. Rep. 643. And in Buffalo Cement Co. v. McNaughton, 90 Hun, 74, where a contractor gave a bond to a city, the sureties on which covenant that the contractor shall pay for all materials which he shall purchase and use about the work, and that, in case he fail so to do, the materialmen may bring an action on the bond in their own names to recover for their materials, it was held that materialmen could not sue, in the absence of proof that they knew of the bond and its provisions and furnished the material, relying on the bond; and that the doctrine of Lawrence v. Fox, 20 N. Y. 268, could not apply because the city (the promisee) was under no obligation to the materialmen. The rule in Pennsylvania is strict, since the general doctrine is confined within narrow limits: Morrison v. Beckey, 6 Watts, 349. In Minnesota, it would seem that a third party might sue sureties if the promisee were under some obligation to such third party: Jefferson v. Asch, 53 Minn. 446, 39 Am. St. Rep. 618. As holding the same rule, see Montgomery v. Rief, 15 Utah, 495.

The Kansas courts are liberal in permitting a third party to sue sureties: Hardesty v. Cox, 53 Kan. 618. The Nebraska courts are even more liberal, and, in Lyman v. Lincoln, 38 Neb. 794, materialmen were allowed to sue sureties on a bond given by a contractor to a city, even though the city (the promisee) seems to have been under no obligation to the materialmen (third parties): See Kaufmann v. Cooper, 46 Neb. 644; Fitzgerald v. McClay, 47 Neb. 816, which hold the same doctrine.

Missouri courts, on the other hand, and especially as distinguished from New York, hold that a city is under such an obligation to laborers and materialmen who furnish work and materials on public buildings that they can sustain an action against sureties on a bond given to the city: Devers v. Howard, 144 Mo. 671; School Dist. v. Livers, 147 Mo. 580; St. Louis v. Von Phul, 133 Mo. 561, 54 Am. St. Rep. 695.

The Oregon courts, which insist that some fund must be placed in the hands of the promisor to which the third party has some equitable claim in order to sustain an action by a third party, would naturally deny a third party a right of action against a surety: Parker v. Jeffery, 26 Or. 186; Brower Lumber Co. v. Miller, 28 Or. 565, 52 Am. St. Rep. 807.

American Rule—Benefit to Sendee of Telegram.—It is to be expected that the sendee of a telegram would have a right of action if the contract were in fact made for his benefit: *Herron v. Western Union Tel. Co.*, 90 Iowa, 129; *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294; *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530; *Olympe de la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547; *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864; *Western Union Tel. Co. v. Jones*, 81 Tex. 271; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; *Western Union Tel. Co. v. Clark*, 14 Tex. Civ. App. 563; *Western Union Tel. Co. v. Gahan*, 17 Tex. Civ. App. 657. Some of the states, however, are not consistent, as, for example, Alabama, which, while holding that a third person has a right of action upon a contract made for his benefit, holds that the sendee of a telegram has no action against the telegraph company unless he was directly or by agent a party to the contract: *Western Union Tel. Co. v. Adair*, 115 Ala. 441; *Postal Tel. Co. v. Ford*, 117 Ala. 672. In Illinois, the sendee cannot recover upon contract: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109. A telegraph company must, it seems, have some notice of the importance of the message to the sendee and the benefit which he is likely to derive therefrom: *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; *Butner v. Western Union Tel. Co.*, 2 Okla. 234. It is sufficient if the benefit to be derived appears on the face of the telegram: *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143. In Indiana, the action against the telegraph company is given by statute: *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

American Rule—Benefit to a Citizen from a Contract Between a Water Company and the City.—The rule under discussion has been sought to be extended to cases where a contract has been entered into between a municipal corporation and a water company, whereby the water company agrees to furnish a certain amount of water for the purpose of extinguishing fire. Such a contract manifestly is intended to benefit the citizens of the municipality, and it would seem that if this were the only element required, a citizen who was injured by reason of a breach of the contract might recover. Kentucky and North Carolina seem to be the only states that permit a recovery—Kentucky on the ground that the party for whose benefit the contract is evidently made may sue, and North Carolina more on the ground that the citizen and taxpayer having furnished the actual consideration money for the contract, is entitled to sue: See *Paducah Lumber Co. v. Paducah etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536; *Owensboro Water Co. v. Duncan* (Ky.), 32 S. W. Rep. 478; *Gorrell v. Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598. It is, indeed, singular that North Carolina, which, up to the time of this case, had denied the right of a third party to sue upon a contract made for his benefit, should permit such an action, while all the states, with the exception of Kentucky, which permit a third party to sue on a contract made for his benefit, refuse to sanction such an action. Those states which require some legal obligation due

from the promisee to the third party would naturally deny the right of a citizen to sue a water company upon such a contract: *Becker v. Keokuk Water Works*, 79 Iowa, 419, 18 Am. St. Rep. 377; *Davis v. Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185; *Ferris v. Carson W. Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Howsmon v. Trenton etc. Co.*, 119 Mo. 304, 41 Am. St. Rep. 654. An earlier Missouri case—*Lampert v. Laclede Gaslight Co.*, 14 Mo. App. 376—finds the public duty which the city owes to the citizen a sufficient obligation to sustain an action. That there is no duty on the part of a municipality toward a citizen to supply water, gas, et cetera, sufficient to sustain an action by such citizen on a contract made for his benefit, see *Wainwright v. Queens County etc. Co.*, 78 Hun, 146. There may be such a duty from the state to the citizen as will allow a citizen to sue upon a contract made for his benefit: *Little v. Banks*, 85 N. Y. 258. Most of the cases are decided upon the ground either that the citizen receives only an indirect benefit, or that he is not in privity with the water company: *Eaton v. Fairbury etc. Co.*, 37 Neb. 546, 40 Am. St. Rep. 510; *House v. Houston etc. Co.*, 88 Tex. 233; *Fitch v. Seymour etc. Co.*, 139 Ind. 214, 47 Am. St. Rep. 258; *Fowler v. Athens City etc. Co.*, 83 Ga. 219, 20 Am. St. Rep. 313; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Bush v. Artesian etc. Co.* (Idaho, 1896), 43 Pac. Rep. 69. These water cases should rest upon one of two grounds, either that the promisee is under no obligation to the citizen, or that the contract was not made for the benefit of the citizen. That there is no privity of contract is unsatisfactory in view of the holding in other cases.

American Rule—Naming the Third Party.—The third party to be benefited by the contract need not be named; it must clearly appear that he was intended to be benefited. One limitation has been placed upon this rule in Maine, in the case of a promise to pay the debt of another. If the promise is general to pay all the debts, with no designation of any particular one, an individual creditor cannot sue at law upon the promise: *Harvey v. Maine Milk Co.*, 92 Me. 115. The general rule, however, is amply sustained by authority: See *Chung Kee v. Davidson*, 73 Cal. 522; *Bristow v. Lane*, 21 Ill. 194; *Knott v. Dubuque etc. Ry. Co.*, 84 Iowa, 462; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; *Duchamp v. Nicholson*, 2 Martin, N. S., 672; *Flower v. Lane*, 6 Martin, N. S., 151; *Maxfield v. Schwartz*, 43 Minn. 221; *Lovejoy v. Howe*, 55 Minn. 353; *State v. Laclede Gaslight Co.*, 102 Mo. 472, 22 Am. St. Rep. 789; *State v. St. Louis etc. Ry. Co.*, 125 Mo. 596; *St. Louis v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695; *Street v. Goodale*, 77 Mo. App. 318; *Joslin v. New Jersey Car etc. Co.*, 36 N. J. L. 141; *Whitehead v. Burgess*, 61 N. J. L. 75; *Coster v. Mayor*, 43 N. Y. 399; *Simson v. Brown*, 68 N. Y. 355; *Wheat v. Rice*, 97 N. Y. 296; *Martin v. Peet*, 92 Hun, 133; *Cincinnati etc. R. R. Co. v. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700; *McCown v. Schrimpf*, 21 Tex. 22, 73 Am. Dec. 221.

American Rule—Acceptance by Third Party.—In Pennsylvania, there must be such an acceptance by the third party of the contract as will release the promisee from any obligation he may be under to the third party: *Ramsdale v. Horton*, 3 Pa. St. 330; *Stone v. Justice*, 9 Phila. 22. It is not the general rule, however, that any formal accept-

ance prior to the bringing of suit is essential: *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Seaman v. Hasbrouck*, 35 Barb. 151. The assent of the third party will be presumed: *Rogers v. Gosnell*, 58 Mo. 589; *Baker v. Eglin*, 11 Or. 333; *Lawrence v. Fox*, 20 N. Y. 268. See *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629. The bringing of suit is a sufficient acceptance: *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 50 Am. Dec. 591; *Copeland v. Summers*, 138 Ind. 219.

In some states, the third party must show some intent to avail himself of the contract: *Wiggin v. Flower*, 5 Rob. (La.) 406; *Johnson v. Collins*, 14 Iowa, 63. In Maryland, he must do some act to bind himself to the promisor: *Eichelberger v. Murdock*, 10 Md. 373, 69 Am. Dec. 140; *Small v. Schaefer*, 24 Md. 143. A third person is not obliged to accept a contract made for his benefit, but may elect to do so: *Carver v. Eads*, 65 Ala. 190; *Young v. Hawkins*, 74 Ala. 370; *Bohanan v. Pope*, 42 Me. 93. And if the third party elects to seek his remedy directly against the party with whom his contract primarily exists, there is an implied abandonment of the other remedy: *Bohanan v. Pope*, 42 Me. 93.

Until the third party has accepted, the parties may rescind the agreement: *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Crowe v. Lewin*, 95 N. Y. 423; *Trimble v. Strother*, 25 Ohio St. 378; *McArthur v. Dryden*, 6 N. Dak. 438. If the third party is acting in reliance upon the agreement, and the parties know it, they cannot rescind: *Crowell v. Currier*, 27 N. J. Eq. 152. As soon as the third party accepts the agreement and consents to avail himself of the advantage given him, the agreement is binding beyond the power of rescission by the original parties thereto: *Pugh etc. Co. v. Barnes*, 108 Ala. 167; *Dodge v. Moss*, 82 Ky. 441; *Pecquet v. Pecquet*, 17 La. Ann. 205; *Knowles v. Erwin*, 43 Hun, 150; *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508; *Thompson v. Gordon*, 3 Strob. 196; *Putney v. Farnham*, 27 Wis. 187, 9 Am. Rep. 459; *Bassett v. Hughes*, 43 Wis. 319. There seems to be one case in which the parties cannot rescind, although the third party may not have accepted the promise. This case is where a grantee, in an absolute conveyance of land, assumes and agrees to pay a mortgage thereon, given by his grantor, and, in such case, an absolute and irrevocable obligation is created in favor of the mortgagee, which cannot be released or affected by any agreement between the grantor and grantee to which the mortgagee does not assent: *Douglass v. Wells*, 18 Hun, 88; *Clark v. Flisk*, 9 Utah, 94. Contra, *Crowell v. Hospital of St. B.*, 27 N. J. Eq. 650. And, in Louisiana, it is held that a party may recover upon an agreement growing out of a contract between two others, where, through a new agreement entered into by the latter, the performance by such person of his obligation was prevented: *Sargeant v. Daunoy*, 14 La. 43, 33 Am. Dec. 573. In the early Indiana cases it was held that a third party could not sue at law unless he had accepted the contract: *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671. If this is required in the modern cases, the bringing of suit seems to be a sufficient acceptance: *Copeland v. Summers*, 138 Ind. 219. It is probably not necessary now, since the blending of the two systems of law and equity.

American Rule—Contract to Pay Another's Debt.—The largest number of cases involving the right of a third party to sue upon a contract made for his benefit have arisen upon contracts to pay the debt of another. The general rule is, that a promise to pay the debt of another may be sued upon by the creditor, even though the debt is not in existence, the third party is not identified, and he was ignorant of the promise: *Riordan v. First Presbyterian Church*, 6 Misc. Rep. 84, 26 N. Y. Supp. 38. Louisiana and Tennessee seem to be the only states that do not recognize the rule in some form, although both states admit the right of a third party to sue upon a contract made for his benefit. These courts say that the promise is made for the benefit of the promisee and not for the benefit of the third party: *Tiernan v. Martin*, 2 Rob. (La.) 523; *Mitchell v. Cooley*, 5 Rob. (La.) 240; *McAlister v. Marberry*, 4 Humph. 426; *Mississippi Cent. R. R. Co. v. Southern etc. Assn.*, 7 Baxt. 595. In Oregon and Pennsylvania, a promise to pay the debt of another cannot be sued upon by the creditor unless property has been delivered to the promisor or some fund created out of which the creditor is to be paid: *Washburn v. Interstate etc. Co.*, 26 Or. 436; *Brower Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep. 807; *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107; *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458; *Adams v. Kuehn*, 119 Pa. St. 76. Pennsylvania further holds that a mere promise to pay the debt of another without the creating of a fund with which the debt is to be paid, is a promise for the benefit of the promisee alone and the third party cannot sue: *Adams v. Kuehn*, 119 Pa. St. 76; *Kountz v. Holthouse*, 85 Pa. St. 235. Where property is delivered to one by a debtor under a promise to pay the debts of the debtor, the creditors may sue, but a recovery can be allowed only to the amount of the property in the hands of the promisor: *Clapp v. Lawton*, 31 Conn. 95; *Chung Kee v. Davidson*, 102 Cal. 188; *Beers v. Robinson*, 9 Pa. St. 229; *Vincent v. Watson*, 18 Pa. St. 96. This rule is not recognized in New York and Illinois, where the promise may be enforced whether the property delivered is sufficient in amount to discharge the debts or not, and it would seem that the latter were the better rule: *Clark v. Howard*, 150 N. Y. 232; *Kingsbury v. Earle*, 27 Hun, 141; *Cobb v. Heron*, 180 Ill. 49. It is not necessary to the validity of a promise made for the benefit of a third person that the original debtor should be discharged: *Wickman v. Hyde Park etc. Assn.*, 80 Ill. App. 523; *Pugh etc. Co. v. Barnes*, 108 Ala. 167; *Nelson v. Hardy*, 7 Ind. 364; *Seaman v. Hasbrouck*, 35 Barb. 151; *Clark v. Howard*, 150 N. Y. 232; *Winninghoff v. Wittig*, 64 Wis. 180. Compare *Goodenow v. Jones*, 75 Ill. 48. If, however, the plaintiff (third party) has not discharged his original debtor, the defendant can, in an action by the third party on the contract, make any defense he could have made had the suit been brought by the promisee: *Pugh etc. Co. v. Barnes*, 108 Ala. 167.

The question has arisen whether such a promise to pay the debt of another is within the statute of frauds and must be in writing, and the states adopting the American rule have, with one exception, held that such a contract is not within the meaning of the statute. Con-

necticut holds that the promise must be in writing: *Clapp v. Lawton*, 31 Conn. 95. Those states not permitting an action by a third party on a contract made for his benefit are more likely to hold such a contract to be within the statute of frauds: See *Haun v. Burrell*, 119 N. C. 544. For the prevailing rule, see *Mason v. Hall*, 30 Ala. 599; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293; *Green v. Richardson*, 4 Colo. 584; *Eddy v. Roberts*, 17 Ill. 505; *Mathers v. Carter*, 7 Ill. App. 225; *Helms v. Kearns*, 40 Ind. 124; *Carter v. Zemblin*, 68 Ind. 436; *Fisher v. Wilmoth*, 68 Ind. 449; *Johnson v. Knapp*, 36 Iowa, 616; *Lamb v. Tucker*, 42 Iowa, 118; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361; *Dearborn v. Parks*, 5 Greenl. 81, 17 Am. Dec. 206; *Maxwell v. Haynes*, 41 Me. 559; *Small v. Schaefer*, 24 Md. 143; *Stariha v. Greenwood*, 28 Minn. 521; *Sweatman v. Parker*, 49 Miss. 19; *Flanagan v. Hutchinson*, 47 Mo. 237; *Beardslee v. Morgner*, 4 Mo. App. 139; *Barnett v. Pratt*, 37 Neb. 349; *Alcalda v. Morales*, 3 Nev. 132; *Joslin v. New Jersey etc. Co.*, 36 N. J. L. 141; *Cleveland v. Farley*, 9 Cow. 639; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387; *Barker v. Bucklin*, 2 Denio, 45, 43 Am. Dec. 726; *Reynolds v. Lawton*, 62 Hun, 596; *Feldman v. McGuire (Or.)*, 55 Pac. Rep. 872; *Delp v. Bartholomay Brew. Co.*, 123 Pa. St. 42; *Wood v. Moriarty*, 15 R. I. 518; *Stadler v. Talley Bros.*, 3 Tex. Civ. App., sec. 472; *Thompson v. Cheeseman*, 15 Utah, 43; *Putney v. Farnham*, 27 Wis. 187, 9 Am. Rep. 459.

Interesting questions have arisen where a grantee of land promises to pay a mortgage with which the property is encumbered. The general rule is, that where it is stipulated in the deed that the purchaser assumes and is to pay the mortgage debt as a part of the consideration, the contract creates a personal liability against the purchaser in favor of the mortgagee: *Thompson v. Dearborn*, 107 Ill. 87; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Daub v. Englebach*, 109 Ill. 267; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Lee v. Newman*, 55 Miss. 365; *Williams v. Naftzger*, 103 Cal. 438; *Cooper v. Foss*, 15 Neb. 515; *Ruhling v. Hackett*, 1 Nev. 362; *Urquhart v. Brayton*, 12 R. I. 169; *McCown v. Schrimpf*, 21 Tex. 22, 73 Am. Dec. 221; *Clark v. Flisk*, 9 Utah, 94; *Thompson v. Cheesman*, 15 Utah, 43; *Kollock v. Parcher*, 52 Wis. 393.

New York has made some modification of the rule, due to the requirement that the promisee must be under some obligation to the third party, or the third party cannot enforce the promise. It is, therefore, held that a grantee is not liable to the mortgagee upon a promise to pay the mortgage debt if the grantor was not personally liable, legally or equitably, for the payment of the mortgage: *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Durnherr v. Rau*, 135 N. Y. 219; *Cushman v. Henry*, 75 N. Y. 103, 31 Am. Rep. 437; *Thayer v. March*, 75 N. Y. 340; *Carter v. Holahan*, 92 N. Y. 498; *Wilbur v. Warren*, 104 N. Y. 192. There is dictum in *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, which announces a contrary doctrine, but the rule as stated above prevails in New York. The New York modification is followed in some of the states: *Brown v. Stillman*, 43 Minn. 126. It is denied in others, however: *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep.

467; *Hare v. Murphy*, 45 Neb. 809; *Brewer v. Maurer*, 38 Ohio St. 545, 43 Am. Rep. 436; *Merriman v. Moore*, 90 Pa. St. 78.

In New York it is also held that where the conveyance is a mortgage, or a deed intended as a mortgage, a stipulation in the deed or mortgage that the grantee assumes and agrees to pay a prior mortgage does not impose upon the mortgagee or grantee a personal liability for the prior mortgage debt. The stipulation in such cases is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor only; it is to protect his property by advancing money to pay his debt: *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Pardee v. Treat*, 82 N. Y. 385. This rule seem to be quite generally followed: *Savings Bank v. Thornton*, 112 Cal. 255; *Lowe v. Turpie*, 147 Ind. 652. Naturally, where the promise is void as between the promisor and promisee, for fraud or want of consideration, the third party cannot sue: *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617. An early Missouri case—*Page v. Becker*, 31 Mo. 466—denies the right of a mortgagee to sue a grantee upon a promise to pay the mortgage debt. Later decisions overrule this, and bring the Missouri decisions in line with the majority of the American cases: *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685.

In New Jersey, the right of a mortgagee to proceed against a grantee is placed upon the doctrine of courts of equity, that a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of surety for others holds for his indemnity, and that he may proceed directly against the person ultimately liable, in order to avoid circuit of action: *Crowell v. Hospital of St. B.*, 27 N. J. Eq. 650. See *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530.

The contract to pay the mortgage debt need not be embodied in the deed of the grantor to the grantee and need not be in writing: *Society of Friends v. Haines*, 47 Ohio St. 423.

Connecticut appears to be the only state holding the general American doctrine of the right of a third party to sue upon a contract made for his benefit which denies the right of a mortgagee to sue a grantee who has assumed the payment of the mortgage debt: *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225. The states holding the English doctrine are likely to deny the personal liability of a grantee to a mortgagee: *Mellen v. Whipple*, 1 Gray, 317. Virginia holds the grantee liable in equity, though not at law: *Willard v. Worsham*, 76 Va. 392; *Osborne v. Cabell*, 77 Va. 462; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882. The grantee certainly comes under no liability in an action at law. Michigan, which denies the right of a third party to sue upon a contract made for his benefit, holds that a grantee who assumed the payment of a mortgage upon property when he accepted the deed, may be held liable for the mortgage debt in foreclosure proceedings: *Crawford v. Edwards*, 33 Mich. 354. But the reasons for this are peculiar to equity, and, as pointed out in *Hicks v. McGarry*, 38 Mich. 667, the grantee cannot be made liable to an action at law at the suit of the mortgagee.

In New York, a promise to pay all the debts of a firm may be enforced by the creditors: *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582. So may a promise to pay a particular firm debt or a specified debt of one of the firm members: *Spingarn v. Rosenfeld*, 24 N. Y. Supp. 733, 4 Misc. Rep. 523; *Brown v. Curran*, 14 Hun, 260; *Reynolds v. Lawton*, 62 Hun, 596. But a promise to pay a certain percentage of the firm debts, as one-half or one-fourth, is not actionable by any individual creditor: *Edick v. Green*, 38 Hun, 202; *Wheat v. Rice*, 97 N. Y. 296. An early New York case holds that where a retiring partner gives a bond of indemnity to the remaining partners to pay all the firm debts, a creditor could not sue on the bond: *Mackintosh v. Fatman*, 38 How. Pr. 145. That the creditors of a firm may sue upon a promise to pay the firm debts, see *Dunlap v. McNeil*, 35 Ind. 316; *Floyd v. Ort*, 20 Kan. 162. An early Missouri case—*Manny v. Frasier*, 27 Mo. 419—denies the right of a creditor to sue an incoming partner on a promise to pay certain firm debts. The holding would probably be different to-day. In Pennsylvania, the tendency is not to allow an action by a creditor unless the promisor retains the firm assets, when a fund is created for his benefit and then he may sue: *Kountz v. Holthouse*, 85 Pa. St. 235; *Bellas v. Fagley*, 19 Pa. St. 273. Where the English rule is held, an action will not generally lie upon a mere promise to pay the debts of a partnership: *McCarteney v. Wyoming Nat. Bank*, 1 Wyo. 382. See generally on the right of a creditor to sue upon a promise made to his debtor to pay his debt, *Dearborn v. Parks*, 5 Greenl. 81, 17 Am. Dec. 206; *Kelly v. Evans*, 3 Penr. & W. 387, 24 Am. Dec. 325; *Gibson v. St. Louis R. R. Co.*, 76 Mo. 549; *Lawrence v. Fox*, 20 N. Y. 268; *Bangs v. Blue Ridge R. R. Co.*, 45 How. Pr. 169; *Judson v. Gray*, 17 How. Pr. 299; *Lovejoy v. Howe*, 55 Minn. 353; *North Alabama etc. Co. v. Short*, 101 Ala. 333; *Winn v. Lippincott Inv. Co.*, 125 Mo. 528; *Feldman v. McGuire (Or.)*, 55 Pac. Rep. 872; *Hume v. Atkinson (Kan. App.)*, 54 Pac. Rep. 15.

American Rule—Third Party Subject to Equities.—A third party who sues upon a promise is subject to the equities that may exist between the original parties to the agreement. As was said in *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617: "There is no justice in holding that an action on such a promise is not subject to the equities between the original parties springing out of the transaction or contract between them. It would be contrary to justice or good sense to hold that one who comes in by what Judge Allen, in *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, calls 'the privity of substitution,' should acquire a better right against the promisor than the promisee himself had": See *Crowe v. Lewin*, 95 N. Y. 423. In *Wheat v. Rice*, 97 N. Y. 296. there is an intimation that, if the promise were accepted before suit was brought, the third party might not be subject to any equities. This modification of the rule is clearly announced in *Pugh etc. Co. v. Barnes*, 108 Ala. 167, at least if the promisee is released from any liability to the third party. See, as supporting the general rule that the third party is subject to equities, *Brandon v. Hughes*, 22 La. Ann. 360; *Ellis v. Harrison*, 104 Mo. 270; *Trimble v. Strother*, 25 Ohio St. 378. In the last case it

was said that if the plaintiff had not been induced to alter his position by relying, in good faith, on the promise made in his favor, the defendant is not estopped from setting up any defense which he could have set up against the enforcement of the contract by the other contracting party.

Rule in Equity.—Indiana and New Jersey seem to be the only states that have to any great extent taken cognizance in equity of promises made for the benefit of another. Indiana courts lay down the rule broadly that in equity a promise by one for the benefit of another could always be enforced, and at least prior to the modern procedure such a promise could not be enforced at law unless previously accepted: *Bird v. Lanius*, 7 Ind. 615; *Beals v. Beals*, 20 Ind. 163; *Raymond v. Pritchard*, 24 Ind. 318; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 67. The blending of the two systems of law and equity has rendered this distinction of little consequence: *Miller v. Billingsly*, 41 Ind. 489; *Carnahan v. Tousey*, 93 Ind. 561. New Jersey sanctions the enforcement of a contract by a third party in equity: *Burlew v. Hillman*, 16 N. J. Eq. 23; *Bennett v. Merchantville etc. Assn.*, 44 N. J. Eq. 116. Equity will enforce contracts not enforceable at law: *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206. Virginia, while not sanctioning a recovery at law upon a promise made for the benefit of another, will, under some circumstances, enforce such a promise in equity: *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646; *Vanmeter v. Vanmeter*, 3 Gratt. 148. A trust is always enforceable in equity: *Cumberland v. Codrington*, 3 Johns. Ch. 262, 8 Am. Dec. 492; *Neilson v. Blight*, 1 Johns. Cas. 205; *Metropolis Bank v. Gutschlick*, 14 Pet. 19; *Page v. Cox*, 10 Hare, 163; *Peer v. Kean*, 14 Mich. 354. In Louisiana, the action by a third party to enforce a contract made for his benefit is equitable in character: *Wright v. Oakley*, 16 La. Ann. 125; *St. Joseph's Assn. v. Magnier*, 16 La. Ann. 338; *Pecquet v. Pecquet*, 17 La. Ann. 204. Where property is delivered to another under a promise to pay debts with it, and the property is not sufficient to pay all the debts, the remedy of creditors, in some states, is in equity, where they may be allowed their proportionate share of the property: *Clapp v. Lawton*, 31 Conn. 95; *Harvey v. Maine Milk Co.*, 92 Me. 115. A third party may sue where his appropriate remedy is in equity, as to enforce a covenant to deed land directly to a third party: *Urquhart v. Ury*, 27 Tex. 7. See *Zell's Appeal*, 111 Pa. St. 532. Connecticut recognizes the right to sue in equity as well as at law, at least when the appropriate relief is equitable: *Crocker v. Higgins*, 7 Conn. 342. It is probably true that in any jurisdiction where the right of a third party to sue upon a contract made for his benefit is recognized, that such third party could sue in equity if his only appropriate relief were to be found in that court. In some of the states which deny the right of a third party to sue at law upon a contract made for his benefit, a suit may be maintained in equity in cases of trust, and in cases where a grantee assumes the payment of a mortgage debt to the mortgagee: *Crawford v. Edwards*, 33 Mich. 354; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882.

Effect of Relationship.—The earlier American cases show a tendency to follow the English case of *Dutton v. Pool*, 2 Lev. 210, where it

was held that a promise to a parent for the benefit of his child would inure to the benefit of the child, the consideration and promise to the father extending to the child by reason of the relationship. The relationship supplied the necessity for some consideration to bring the child into privity with the promisor. In England this decision has been overruled. Michigan, which follows the English rule very closely, permits no action by a near relative upon a promise made for his benefit: *Wheeler v. Stewart*, 94 Mich. 445; *Linneman v. Moross*, 98 Mich. 178, 39 Am. St. Rep. 528. As already pointed out, Massachusetts at first appeared to follow *Dutton v. Pool*, 2 Lev. 210, and to give an action to a near relative on a promise made for his benefit: *Felton v. Dickinson*, 10 Mass. 287; *Mellen v. Whipple*, 1 Gray, 317. But in *Marston v. Bigelow*, 150 Mass. 45, these early cases were overruled, and the court held that a child could maintain no action upon a promise made for its benefit unless the child furnished the consideration; the mere fact of nearness of relationship was not a sufficient consideration. And in *Eaton v. Libbey*, 165 Mass. 218, 52 Am. St. Rep. 511, the rule that the child must furnish the consideration was extended to the case of a child being named by another in consideration of a promise to its parents. The court said that a child has an interest in the name which it shall bear analogous to the interest which a child has in its own services, which belong to the father, but which, if the father waives his right, furnish a good consideration for a promise, such consideration moving from the child. The mere fact of relationship does not, in Vermont, supply a sufficient consideration so that the party in whose favor the promise is made may sue upon it: *Figure v. Mutual Soc.*, 46 Vt. 362. A dictum in *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332, intimated a contrary doctrine. The later case of *Coleman v. Whitney*, 62 Vt. 123, sustained the suit of a wife upon a promise to her husband to support her, and the earlier cases seem not to be cited. There was, however, more than the mere relationship between the husband and wife to support the promise.

The rule in New York is still unsettled as to its extent. As applied to a parent and his child, even when the child is illegitimate, a promise to the parent for the benefit of the child may be enforced by the child: *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Hook v. Pratt*, 78 N. Y. 371, 34 Am. Rep. 539; *Knowles v. Erwin*, 43 Hun, 150; *Coleman v. Hiler*, 85 Hun, 547; *Babcock v. Chase*, 92 Hun, 264. The New York rule giving a third party a right of action upon a contract made for his benefit requires that the promisee shall be under some obligation to the third party. While in some of the cases the duty of a parent to support the child is given as an obligation sufficient to support the action by the child, yet in cases where the promise is not to fulfill that duty of the parent, the New York courts would undoubtedly hold that the mere relationship itself furnishes a sufficient consideration to support the action by the child: See *Buchanan v. Tilden*, 5 App. Div. 354. As applied to husband and wife, the mere fact of the relationship would probably not be sufficient to allow the wife to maintain an action upon a promise made for her benefit. This exact question is still an open one, but the

tendency of the courts is to require some obligation, legal or equitable, from the promisee to the third party even in the case of husband and wife: *Buchanan v. Tilden*, 158 N. Y. 109, 70 Am. St. Rep. 454, reversing 5 App. Div. 354; *Klotz v. Klotz*, 46 N. Y. Supp. 255, 20 Misc. Rep. 662.

In Connecticut, as indicated by the principal case, the question turns upon whether the promise is for the sole and exclusive benefit of the party. The fact of relationship seems to figure very little. Indiana enforces a promise at the instance of a relative in whose favor it was made. But as no obligation from the promisee to the third party is required, the question of relationship amounts to little, as the same promise would be enforced in favor of a stranger, unless the rule becomes more restricted than it is at present: *Gwaltney v. Wheeler*, 26 Ind. 415; *Van Cleave v. Clark*, 118 Ind. 61; *Stevens v. Flannagan*, 131 Ind. 122; *Waltz v. Waltz*, 84 Ind. 403. In Kentucky, the fact of relationship had much weight in the earlier cases, but in view of more recent cases it would probably have less: *Clarke v. McFarland*, 5 Dana, 45; *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912. See *Gooden v. Rayl*, 85 Iowa, 592; *Strong v. Marcy*, 33 Kan. 109; *McNamee v. Withers*, 37 Md. 171; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

Instruments Under Seal.—The tendency of the early cases, following the old common-law doctrine, was to hold that only parties to an instrument under seal could maintain an action upon it: *Vickery v. Walker, Smith* (Ind.), 78; *Haskett v. Flint*, 5 Blackf. 69, 33 Am. Dec. 452; *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646; *Millard v. Baldwin*, 3 Gray, 484; *Hager v. Phillips*, 14 Ill. 260; *Strohecker v. Grant*, 16 Serg. & R. 237; *Cox v. Skeen*, 2 Ired. 220, 38 Am. Dec. 691; *Robbins v. Ayers*, 10 Mo. 538, 47 Am. Dec. 125; *Douglas v. Branch Bank*, 19 Ala. 659. Where, however, the consideration is furnished by a third party, the third party may sue upon it: *Weston v. Barker*, 12 Johns. 276, 7 Am. Dec. 319; *Felton v. Dickinson*, 10 Mass. 287; *Follansbee v. Johnson*, 28 Minn. 311; *Johnson v. McClung*, 26 W. Va. 659. In some states the rule still prevails that a third party cannot maintain a suit upon a contract made for his benefit, if the contract is under seal: *Hunter v. Wilson etc. Co.*, 21 Fla. 250; *Lee v. Newman*, 55 Miss. 365; *New England etc. Co. v. Rockport etc. Co.*, 149 Mass. 381; *Saunders v. Saunders*, 154 Mass. 337; *Harms v. McCormick*, 132 Ill. 104.

The modern tendency, assisted by statutory provisions, is to disregard the distinction between sealed and unsealed instruments, and to allow a third party to sue upon a sealed instrument which is made for his benefit, though not a party thereto: *Mize v. Barnes*, 78 Ky. 506; *Dick v. Reynolds*, 4 Martin, N. S., 525; *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618; *Rogers v. Gosnell*, 51 Mo. 466; *State v. St. Louis etc. Ry. Co.*, 125 Mo. 596; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 207; *Van Schaick v. Third Avenue R. R.*, 38 N. Y. 346; *Coster v. Mayor*, 43 N. Y. 399; *Riordan v. First Presby. Church*, 6 Misc. Rep. 84, 26 N. Y. Supp. 38; *Emmitt v. Brophy*, 42 Ohio St. 82; *Hughes v. Oregon Ry. etc. Co.*, 11 Or. 437; *McDowell v. Laev*, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319; *Stites v. Thompson*, 98 Wis. 329.

In Illinois, the rule was early established that a third party could not sue upon a contract for his benefit if the contract were under seal: *Moore v. House*, 64 Ill. 162. But the common-law rule was supposed to have been changed by statute, and this supposition was voiced by the supreme court in the case of *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467. And again in *Harms v. McCormick*, 30 Ill. App. 125. This last case was, however, on appeal in 132 Ill. 104, reversed, and the court said that the statement in *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467, was a dictum and would not be followed. The latest expression upholding the distinction between sealed and unsealed instruments is *Hillsboro etc. Assn. v. Simmering*, 75 Ill. App. 647. *Contra*, *Robinson v. Holmes*, 75 Ill. App. 203.

Statutory Provisions.—The rule that a third party may sue upon a contract made for his benefit, although a stranger to the promise and to the consideration, became established in some states prior to the reformed procedure. Perhaps without the aid of statutes most of the states would have adopted this just and sensible rule. However, in many of the states, statutes have been passed which give a right of action to the real party in interest, and these statutory provisions have served at least to strengthen and make secure the right of a third party to sue upon a contract made for his benefit: See *Ellis v. Harrison*, 104 Mo. 270; *Rice v. Savery*, 22 Iowa, 470; *Miliani v. Tognini*, 19 Nev. 133; *McArthur v. Dryden*, 6 N. Dak. 438. Statutes allowing the real party in interest to sue have been passed in Alabama, California, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Wisconsin. Statutes specifically giving to a third party a right of action upon a contract made for his benefit have been passed in California and Dakota: See California Civ. Code, sec. 1659; Dakota Comp. Laws, sec. 3499.

Rule in the Federal Courts.—There are numerous cases in the United States courts which uphold the right of a third party to sue upon a contract made for his benefit. In fact, some of the best considered cases on the question are found in the federal courts: See *Hendrick v. Lindsay*, 93 U. S. 143; *St. Louis Second Nat. Bank v. Grand Lodge*, 98 U. S. 123; *Austin v. Seligman*, 18 Fed. Rep. 519; *Weldon Nat. Bank v. Smith*, 86 Fed. Rep. 398. This question, however, is one arising in actions at law, and the rule in such cases is that the federal courts will follow the rule enforced in the state where the court happens to be sitting. There seems to be nothing in the subject itself to make it a question of general law and so take it out of the general rules stated above. The case of *American Exchange Nat. Bank v. Northern etc. R. R. Co.*, 76 Fed. Rep. 130, would indicate that there was a well-recognized rule in the federal courts that made it obligatory upon those courts to follow. This case, however, arose in Washington, where there seems to be no settled rule upon the question. On the other hand, it was held in *Woodland v. Newhall*, 31 Fed. Rep. 434, that a third party could not sue upon a contract made for his benefit. And this case arose in Virginia, where the right of a third party to sue upon such a contract is denied. Naturally, most of the cases arising in the federal courts

would give to the third party a right of action, and this would be true even if they followed the decisions of the state in which they were sitting. Whether they establish a real federal doctrine is doubtful.

WARD v. CONNECTICUT PIPE MANUFACTURING CO.

[71 CONNECTICUT, 345.]

JUDGMENT—PERSONAL—CLAIM AGAINST RECEIVER.

A judgment recovered by default in New York, where the only service of process upon the defendant was made out of that state, cannot found a claim against the estate in the hands of the receiver.

RECEIVERS—ATTACHMENT BEFORE APPOINTMENT OF—RIGHTS OF NONRESIDENT CREDITOR.—A nonresident creditor who attaches property of a Connecticut corporation in another state, before the corporation is placed in the hands of a receiver, may avail himself of such security, and, should it prove insufficient to satisfy his demand, he may present his claim for the balance in the same manner as any other creditor. In such a case, the net proceeds are all for which the execution creditor is accountable in the reduction of his demand.

ASSIGNMENT—VOIDABLE—CHANGE OF POSSESSION.

—An assignment of personal property, not followed by a change of possession, is voidable by attaching creditors, unless the assignee can give satisfactory excuse for the want of delivery.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—CHANGE OF POSSESSION.—An assignment by an insolvent debtor for the benefit of his creditors generally is not within the reason of the rule that an assignment of personal property, not followed by a change of possession, is voidable by attaching creditors.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary conveyance of goods made by the owner at his domicile, in a form which is sufficient there and also at common law, is effectual to transfer the title, although they may, at the time, be in another state, unless the statutes or local policy of that state forbid.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT WHERE PROPERTY IN ANOTHER STATE.—The effect of a transfer made by the owner at his domicile, on goods in another state, is not to be determined simply by the rule of comity which is applicable to extraterritorial assignments by operation of law, but rests on the general principles of jurisprudence as to the right of everyone to dispose of what he owns.

RECEIVERS—ATTACHMENT AFTER APPOINTMENT OF.—A nonresident creditor, who attaches and sells property of an estate after the estate has been placed in the hands of a receiver, and with equitable notice of the receiver's title, can be allowed to share as a creditor in the estate only after renouncing the benefit of the attachment and accounting for the property wrongfully converted. In such a case, the measure of liability is the fair value of the property at the date of the attachment, with interest.

Application by a receiver for instructions in regard to the allowance and payment of certain claims presented against the defendant corporation. The Davies & Thomas Co., a Pennsyl-

vania corporation, was a creditor of the defendant, a Connecticut corporation, which had an office and property in the state of New York. The Davies & Thomas Co. attached part of this property December 28, 1897, the defendant not being served with process until January 24, 1898, in Connecticut. On December 29, 1897, the defendant was placed in the hands of a receiver. February 24, 1898, a second attachment was levied on other property of the defendant by the Davies & Thomas Co., the latter having knowledge of the appointment of the receiver. The receiver, being informed by third parties that all the defendant's property had been taken by the attachment of December 28, 1897, did not take possession of any of the property. The property taken under both attachments was sold to the Davies & Thomas Co., and a part resold by them at an advance. The Davies & Thomas Co. seeks to come into the winding-up suit, and have its claims against the defendant allowed. The receiver refuses to allow the claims.

E. P. Arvine and George E. Beers, for the Davies & Thomas Co., a creditor.

Talcott H. Russell, for the receiver.

353 BALDWIN, J. The judgment recovered by default in the supreme court of the state of New York cannot found a claim against the estate in the hands of the receiver. The only service of process upon the defendant having been made out of that state, there exists no personal obligation on its part to pay it.

The right of the Davies & Thomas Company, however, to present its original account against the defendant for allowance in the receivership proceedings in this state, was not prejudiced by its having put it into judgment in New York. That was necessary to secure the benefit of the attachment which had been lawfully made before those proceedings were commenced: *Lawrence v. Batcheller*, 131 Mass. 504. Our statute dissolving attachments made within sixty days before the appointment of a receiver of a corporation (Pub. Acts 1895, p. 491), has no application to legal proceedings in other states.

There is no ground for the claim that the Davies & Thomas Company, after receiving notice of the appointment of the receiver in Connecticut, was put to an election whether to pursue its remedy in the New York courts, or in those of this state. Whatever might be true, had it been a citizen of Connecticut,

it had a right, as a citizen of Pennsylvania, to avail itself of the security which it had already obtained by attachment, as fully as if it had come by a mortgage, and should it prove insufficient to satisfy its demand, to maintain ³⁵⁴ a claim for the balance in the same manner as any other creditor.

The property thus attached naturally brought less than its fair market value at the sale on execution. Being, however, in the custody of the New York court, and a forced sale being the only legal mode of disposing of it to satisfy the judgment, the net proceeds were all for which the execution creditor was accountable in reduction of its demand.

Different considerations apply to the second attachment, and govern its consequences. It was made after the appointment of the receiver, and with notice of that fact. The decree under which he derived his title required the defendant to execute conveyances of any of its property which might be necessary and proper by way of further assurance. It did execute forthwith a conveyance to him of all its property in New York. The Davies & Thomas Company had notice of the decree, and therefore equitable notice that such a conveyance might have been made, a month before it made its second attachment.

An assignment of personal property, not followed by a change of possession, is voidable by attaching creditors, unless the assignee can give a satisfactory excuse for the want of delivery: *Swift v. Thompson*, 9 Conn. 63, 21 Am. Dec. 718. The defect of title is due to a presumption of fraud derived from the consent of the assignee to a continuance of the appearance of ownership in the assignor. An assignment by an insolvent debtor for the benefit of his creditors generally is not within the reason of the rule. He cannot be presumed to intend to defraud any of them by a conveyance made in the interest of all. Nor is it certain that everything that is assigned will be accepted. The representative of the creditors is entitled to a reasonable time within which to decide whether any particular item of the property is worth taking, or not.

The suit now before us is one brought by a majority of the defendant's stockholders for its dissolution, and counts upon a vote of the directors that its affairs ought to be wound up and a receiver appointed. The receiver's failure to take possession of the goods upon which the second attachment was ³⁵⁵ levied, is sufficiently explained by the information which he received that they had been seized under the first attachment before his appointment. Under these circumstances, the trans-

fer of title to him was good under our law, as against any creditors of the defendant. It is unnecessary to determine whether the receiver, never having been in possession, could have set it up before the courts of New York to defeat the attachment. He did not intervene for that purpose in the proceedings there, nor, had he done so unsuccessfully, would it have precluded him from insisting that in this suit the Davies & Thomas Company appears in the character of a wrongdoer, asking equity where it has not done equity: *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 386, 38 Am. Rep. 518. General Statutes, section 532, directs courts of probate, in the settlement of estates of insolvent debtors, after providing for preferred claims, to order all other claims allowed by the commissioners to be paid pro rata, "subject to such existing equities as may be ascertained and decreed by the court, upon hearing, after public notice." A similar rule must govern in these proceedings: Gen. Stats., secs. 1942, 1965; Pub. Acts 1895, sec. 3, p. 573; *In re Waddell-Entz Co.*, 67 Conn. 324. The Davies & Thomas Company not only knew of the decree appointing the receiver, but knew, or had ample means of knowing, when the second attachment was made, that the property had been transferred to the receiver by a good conveyance at common law, executed in furtherance of that decree. It is not alleged, and cannot be presumed that, under the law of New York, such a transfer is invalid: *Guilander v. Howell*, 35 N. Y. 657; *Hoyt v. Thompson*, 19 N. Y. 207, 224. A voluntary conveyance of goods made by the owner at his domicile, in a form which is sufficient there and also at common law, is effectual to transfer the title, although they may at the time be in another state, unless the statutes or local policy of that state forbid. The present was from the beginning substantially a voluntary proceeding. Its declared purpose was to carry out a vote of the directors of the defendant company providing for winding it up through the agency of a receiver. Service of the writ was accepted ³⁵⁶ by the defendant, with a stipulation for its immediate return, and for a hearing on the day of its issue, upon the application for a temporary receiver. The statute authorizes the superior court, as a court of equity, to wind up the affairs of any such corporation and dissolve it, on the complaint of shareholders owning not less than a tenth of its capital stock, if it be found that the interests of the shareholders will thus be best protected: Pub. Acts 1895, sec. 1, p. 571. The appointment of the plaintiff was based upon such a finding. No element of compulsion is dis-

closed by these proceedings. If the assignment by the defendant to the receiver had been forced upon it at the instance of a creditor, this might have been regarded as an *in invitum* proceeding: *Catlin v. Wilcox Silver-Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338. As it is, that question is not involved, for the conveyance made to protect its interests, and under a decree which three-quarters of its shareholders had sought and none opposed, cannot fairly be regarded as other than a voluntary one. It was an exercise of the *jus disponendi* which is incident to ownership. It placed the goods which were its subject precisely where the defendant wished to have them placed, at the disposal of one representing primarily all its creditors and secondarily all its shareholders. This wish had been first expressed by the vote to wind up; then by the consent to an immediate hearing on a petition by three-quarters of the shareholders for the appointment of a receiver to aid in carrying out the vote; then by making no opposition to such an appointment, by what was virtually a consent decree; and finally by transferring to him whatever title it could to all that it possessed.

The effect of such a transfer on goods in another state is not to be determined simply by the rule of comity which is applicable to extraterritorial assignments by operation of law; but rests on the general principles of jurisprudence as to the right of everyone to dispose of what he owns: *Egbert v. Baker*, 58 Conn. 319; *First Nat. Bank v. Walker*, 61 Conn. 154.

The *Davies & Thomas Company* has come into this state ³⁵⁷ to secure, at the hands of a court of equity, the benefit of a winding-up suit, in the course of which it has acquired a special advantage by a seizure of assets of the estate in another jurisdiction, with actual notice of the pendency of the action, and equitable notice of the receiver's title under the conveyance which has been under consideration. No one can claim the benefit of such a proceeding without renouncing every right which is inconsistent with its proper object. That object is, primarily, to dispose of all the property which the defendant owned at the commencement of the suit, subject to existing liens and lawful preferences, for the equal benefit of all its creditors. This cannot be accomplished, if, without leave of the court, new liens can be created upon it or preferences secured, upon no new consideration, during the pendency of the action.

The benefit of the first attachment can be lawfully retained. That of the second must be renounced, and the property taken upon it considered, as between the receiver and the *Davies &*

Thomas Company, as assets of the estate which it has wrongfully converted, and for which it must account, before it can be allowed to share as a creditor in the estate. The measure of liability is the fair value of the goods at the date of the attachment, with interest: *Oviatt v. Pond*, 29 Conn. 479. As it had no equitable right to levy on them, it is immaterial that they brought less than their value at the sheriff's sale.

If the Davies & Thomas Company pays the amount above stated to the receiver, it should be admitted to prove its claim upon its original account against the defendant, less the net proceeds of the goods sold under the first attachment. In ascertaining such proceeds, no deduction from the gross amount received from their sale should be made on account of fees or costs accruing under the second attachment. If it does not make such payment, its claim should be wholly disallowed: *In re Greeley*, 70 Conn. 494; *Cockerell v. Dickens*, 3 Moore P. C. C. 98, 132.

The superior court is advised that the Davies & Thomas Company is not entitled to prove its claim against the estate in the hands of the receiver, unless it first pays him the ³⁵⁸ amount specified in the foregoing opinion; and that, upon such payment, it can prove a claim, but only for the original indebtedness, less the net proceeds of the original attachment, ascertained as indicated in said opinion.

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.

RECEIVERS—RIGHTS OF NONRESIDENT CREDITORS TO ATTACH PROPERTY.—A foreign receiver cannot assert title to property within the state, as against the attachment of a resident creditor, especially when the sole purpose of the receivership is to enable the debtor to hinder, delay, and defraud resident creditors: *Grogan v. Egbert*, 44 W. Va. 75, 67 Am. St. Rep. 763; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917.

RECEIVERS—ATTACHMENT AFTER APPOINTMENT—RIGHTS OF NONRESIDENT CREDITOR.—The general rule is, that property in the hands of a receiver is not subject to attachment: *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776. But, as applied to foreign receivers, the rights of nonresident attaching creditors are paramount in the courts of the state where the attachment is sued out to those of a receiver who was appointed by the court of another state, and whose appointment antedates by issuance of the writ of attachment: *Catlin v. Wilcox Silver Plate Co.* 123 Ind. 477, 18 Am. St. Rep. 338; *Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76, and note. But, see *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CHANGE OF POSSESSION.—As opposed to the rule in the principal case, it has been held that leaving a debtor in possession of his property is such

a benefit as vitiates an assignment made by him, for the benefit of his creditors: *Anderson v. Fuller*, McMull. Eq. 27, 36 Am. Dec. 290. *Contra*, *Pike v. Bacon*, 21 Me. 280, 38 Am. Dec. 259.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT.—A voluntary assignment in insolvency for the benefit of creditors, if valid where made, is valid everywhere, unless repugnant to the law of the place where property of the insolvent is situated, and detrimental to the rights of domestic creditors in the latter jurisdiction: *Hayden v. Yale*, 45 La. Ann. 362, 40 Am. St. Rep. 232, and note.

MAISENBACHER v. SOCIETY CONCORDIA.

[71 CONNECTICUT, 369.]

PLEADING—JOINDER OF CAUSES OF ACTION.—Several causes of action may be stated in a single count, when such causes of action are not separate and distinct from one another; that is, separable by some distinct line of demarcation.

DAMAGES—EVIDENCE.—All the attending acts and circumstances, which accompany and give character to an assault, may be given in evidence to enhance the damages.

DAMAGES—MENTAL SUFFERING.—Mental as well as physical suffering, when properly alleged, may be proved as an element of actual damage, and as naturally and directly resulting from an assault.

DAMAGES.—PUNITIVE damages, which are awarded with the view of punishing the defendant for his wrongful act, may be recovered in Connecticut.

DAMAGES—PUNITIVE—WHEN ALLOWED.—The cases in which punitive damages may be awarded are only those actions of tort, founded on the malicious or wanton misconduct of the defendant, or upon such culpable neglect of the defendant as is tantamount to malicious or wanton misconduct.

DAMAGES—PUNITIVE.—PRIVATE CORPORATIONS, as well as individuals, may for their own acts become liable in punitive damages.

DAMAGES.—EXPENSES OF LITIGATION are not an element of the damages, termed in law actual or compensatory, and can only be considered in those cases in which exemplary damages may be awarded.

DAMAGES.—THE AMOUNT OF PUNITIVE DAMAGES which can be awarded, in a proper case, is limited to the expenses of litigation in excess of taxable costs.

DAMAGES—MASTER AND SERVANT.—A master is liable for compensatory damages for injuries caused by the negligence of the servant within the scope of his employment.

DAMAGES—MASTER AND SERVANT—AGENCY.—A principal cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent.

DAMAGES—PUNITIVE—AGENCY.—No recovery of exemplary damages can be had against a principal for the tort of an agent or servant, unless the defendant expressly authorized the act as it was performed, or approved it, or was grossly negligent in hiring the agent or servant.

Action to recover damages for assault and battery, and for the wrongful ejection of the plaintiff from a dance hall.

Eugene C. Dempsey and John R. Booth, for the defendant.

Daniel Davenport and Howard W. Taylor, for the plaintiff.

375 HALL, J. The complaint alleges in substance that the plaintiff, having contracted with and paid the defendant for the privilege of dancing at a certain ball, was, by the forcible **376** acts of the defendant's agents, prevented from exercising her said right, and was thereby caused pain and damage.

The trial court correctly charged the jury that the complaint described two causes of action, one for personal injury, and the other for a breach of contract. Under the averments of the complaint, the plaintiff would have been entitled to a verdict upon proof either that she was forcibly prevented from dancing, as alleged, or that the defendant's agents, without using force, unlawfully deprived her of the privilege which was granted to her by her contract with the defendant.

We have no occasion to decide whether these two causes of action should have been stated in separate counts. Several causes of action may be stated in a single count, when such causes of action are not separate and distinct from each other; that is, separable from each other "by some distinct line of demarcation": *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 563. The defendant, not having demurred to the complaint, has waived the question whether the two causes of action were improperly joined in one count: *Practice Book*, p. 17, rule 4, sec. 13.

Apparently, no question was made at the trial but that under the pleadings the plaintiff, upon proof that the defendant's agent forcibly prevented her from dancing, became entitled to a verdict for a sum sufficient to indemnify her for the actual injuries she sustained, and which were the direct and natural consequences of the wrongful act complained of. The complaint alleges that in consequence of the assault the plaintiff was deprived of the privileges of the ball, that she suffered physical and mental pain and anguish, and lost her earnings in the trade at which she had been employed. The court instructed the jury that in determining the amount of compensatory damages to be awarded the plaintiff, they might take into consideration the indignity she had suffered by an assault in so public a place, the mental as well as her physical suffering

which it caused her, and such loss as had been proved she had thereby sustained from inability to work at her trade.

"All the attending acts and circumstances which accompany ³⁷⁷ and give character to the assault may be given in evidence to enhance the damages": *Brzezinski v. Tierney*, 60 Conn. 55, 62. Mental as well as physical suffering, when properly alleged, may be proved as an element of actual damage, and as naturally and directly resulting from an assault of the character described in the complaint: *Gibney v. Lewis*, 68 Conn. 392, 396; *Seger v. Barkhamsted*, 22 Conn. *290, *298; *Masters v. Warren*, 27 Conn. *293, 299. The defendant has no cause to complain of the charge of the court with reference to the elements which go to make up compensatory damages.

The complaint alleges that the defendant's agent, in committing the assault, "addressed the plaintiff in loud, threatening, and insulting language," and that the assault upon the plaintiff was "committed in a gross, wanton, and reckless manner, and with intent to" injure the plaintiff.

The defendant, in effect, requested the court to charge the jury that the defendant society could not, upon the proof presented, be held liable in exemplary damages. The court did not comply with this request, but instructed the jury that in case they found that a battery had been inflicted upon the plaintiff by the defendant's agent, "wantonly, maliciously, or in wanton disregard of the plaintiff's rights," they might add to that sum which they should find sufficient to compensate the plaintiff for her injuries, "a sum as exemplary or punitive damages," and might award her as punitive damages such sum as the jury, from their "knowledge of the course of business in the courts of law in this state," should find "to be her expense in conducting this trial," less the taxable costs which she would recover.

The jury returned a verdict for the plaintiff for three hundred dollars. We have not the evidence in the case before us; but from the finding of facts and from the charge of the court, stating the claims of the parties as to the character and extent of the plaintiff's injuries, we think the jury may, under such instruction, have included in their verdict, as an element of damages, the expenses incurred by the plaintiff in conducting her trial, less the taxable costs; and unless this is a case in which such expenses could lawfully be recovered, the ³⁷⁸ charge of the court was incorrect and a new trial should be granted.

That a plaintiff may, in an action for an assault and battery and in certain other actions of tort, recover certain damages

which are not compensatory within the technical and legal meaning of that word, but which are awarded with the view of punishing the defendant for his wrongful act, has been settled in this state, beyond question, by a large number of decisions extending from *Linsley v. Bushnell*, 15 Conn. *225, 38 Am. Dec. 79, to *Gibney v. Lewis*, 68 Conn. 392.

The cases in which punitive damages may be awarded are only those actions of tort "founded on the malicious or wanton misconduct of the defendant," or upon "such culpable neglect of the defendant" as is "tantamount to malicious or wanton misconduct": *St. Peter's Church v. Beach*, 26 Conn. *355; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Burr v. Plymouth*, 48 Conn. 460. And private corporations, as well as individuals, may for their own acts become liable in punitive damages: *Sedgwick on Damages*, 8th ed., sec. 379; *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 27 Am. Dec. 682; *Murphy v. New York etc. R. R. Co.*, 29 Conn. 496.

The expenses of litigation are not an element of the damages termed in law actual or compensatory damages; "they are not the natural and proximate consequence of the wrongful act," and they can only be considered by the jury in those cases in which exemplary damages may be awarded: *St. Peter's Church v. Beach*, 26 Conn. 355; *Platt v. Brown*, 30 Conn. 336; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Gibney v. Lewis*, 68 Conn. 392. Such expenses in excess of taxable costs, in cases in which they may be considered, limit the amount of punitive damages which can be awarded: *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51; *Burr v. Plymouth*, 48 Conn. 460. In cases where they may be considered, it is not usual to prove the expenses of litigation actually incurred, but the court may admit relevant evidence for that purpose: *Bennett v. Gibbons*, 55 Conn. 450.

The case before us, as shown by the record, is not one in which the defendant society could be held liable in punitive damages. The defendant is a corporation. The alleged assault ~~379~~ was committed by a floor manager "appointed by the defendant to have the regulation and charge of the dancing" at a ball given by the defendant. The assault which the court instructed the jury would, if found to have been committed and to have been inflicted wantonly and maliciously, entitle the plaintiff to exemplary damages, was the putting of his hand by one of the floor managers upon the plaintiff's shoulder "rudely, insolently, or angrily," and while she was upon the ballroom

floor, "at the same time telling her that she could not dance there, and that she was not a fit person to be there." If these facts are sufficient to show that the act of the agent was malicious or wanton, they do not prove that the principal in any way participated in such malicious or wanton misconduct. As its agent was acting within the scope of his employment, the law compels the defendant to compensate the plaintiff for the injuries she has sustained from the wrongful acts of the agent, but it does not punish the defendant for the malicious purpose or intent which prompted the agent's conduct.

To render the principal liable in exemplary damages for the acts of his agent in the course of his employment, but done with such malicious intent, some misconduct of the former beyond that which the law implies from the mere relation of principal and agent, must be shown. It is not claimed that the defendant society directed the floor manager to remove the plaintiff, or to act toward any person in the manner in which it is alleged he did, or that the defendant has since adopted or approved of his action.

In *Cleghorn v. New York etc. R. R. Co.*, 56 N. Y. 44, 47, 15 Am. Rep. 375, Chief Justice Church, in delivering the opinion of the court, says: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct."

In the case of *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101, 107, in which this question is very fully discussed ³⁸⁰ and the decisions in both the federal and state courts upon this subject reviewed, Mr. Justice Gray, speaking for the court, laid down the rule as deducible from the authorities, that "guilty intention upon the part of the defendant is required in order to charge him with exemplary or punitive damages. . . . Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent upon the part of the agent."

In 1 Sedgwick on Damages, eighth edition, sections 378 and 380, the author, after citing very fully the conflicting authorities in different jurisdictions upon this question, says: "It is the better opinion that no recovery of exemplary damages can be had against a principal for the tort of an agent or servant, unless the defendant expressly authorized the act as it was performed, or approved it, or was grossly negligent in hiring the agent or servant."

In the case at bar, as it appears by the record before us, we think compensation for the injury suffered was the full measure of the defendant's responsibility, and that there was error in charging the jury that they might award the plaintiff as punitive damages the expenses of trial in excess of taxable costs, and in not charging upon the subject of punitive damages as requested by defendant.

Error and new trial granted.

In this opinion the other judges concurred.

DAMAGES—MENTAL SUFFERING.—When damages for mental suffering are allowed, see *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 41 Am. St. Rep. 17. The mental suffering must be connected with physical injury, or injury to property: *Gulf etc. Ry. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866. The mental suffering must be the direct and natural consequences of the wrong: *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370. See, generally, the note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534.

DAMAGES.—PUNITIVE DAMAGES are given by way of punishment for the wrong inflicted: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475, 28 Am. St. Rep. 858, and monographic note thereto. Exemplary damages are given where the injury for which an action is brought has been caused by recklessness, wantonness, willfulness, or malice, or has happened through gross negligence. Ordinary negligence is not ground for punitive damages: *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 68 Am. St. Rep. 913.

DAMAGES—PUNITIVE.—CORPORATIONS may become liable for exemplary damages, but the cases on this question are in conflict: Note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 876; *Missouri etc. Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794.

DAMAGES—PUNITIVE—MASTER AND SERVANT.—Punitive damages will not be allowed, as against a principal, unless he participated in the wrongful act of his agent, expressly or impliedly authorizing or approving it, either before or after it was committed, so that he becomes particeps criminis of his agent's act: *Hagan v. Providence etc. R. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377, and monographic note thereto, discussing the question: *Cleghorn v. New York Cent. etc. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.

DAMAGES — PUNITIVE — AMOUNT. — Exemplary damages would seem to mean, in the ordinary and proper sense of the word, such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as might serve as a wholesome example to others in like cases: *Freidenheit v. Ed-*

mundson, 36 Mo. 227, 88 Am. Dec. 141; Pittsburgh etc. Ry. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517; Ross v. Leggett, 61 Mich. 445, 1 Am. St. Rep. 608.

DAMAGES—EVIDENCE.—In ascertaining the measure of damages in an action on the case for an injury to property, all the circumstances connected with the injury are proper to be considered by the jury: *Ottawa Gas etc. Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263.

WORDIN'S APPEAL.

[71 CONNECTICUT, 531.]

TRUSTS—EXPENSES CHARGEABLE TO INCOME.—Reasonable expenses in a foreclosure suit are ordinary expenses attending the administration of a trust estate, and are properly deducted from the fruits belonging to the party in immediate enjoyment of the equitable estate.

LIFE TENANT AND REMAINDERMAN—LIABILITIES OF.—It is the nature, object and result, rather than the amount of an expenditure, which usually determines whether it is chargeable to a life tenant or to the remainderman.

TRUSTS—EXPENSES CHARGEABLE TO INCOME.—However large, if properly and reasonably incident to the management of the estate in behalf of the party equitably entitled to the accruing income, and not resulting in a direct increase of the principal fund, nor in substitutions which vary the items of which that is composed, a trustee's charges and disbursements are, they are, under ordinary circumstances, payable from its income, if that be sufficient for the purpose, unless it be otherwise provided by the terms of the trust.

TRUSTS—EXPENSES.—AN ASSESSMENT for asphaltting the street in front of land belonging to a trust estate should be paid out of the income from the estate, in the absence of evidence showing that the improvement was of a permanent character.

Appeal from an order and decree of the court of probate, approving the account of a testamentary trustee in charging certain items of expense to the income rather than the corpus of the trust fund. The items of expense were, one hundred and forty-seven dollars for the trustee's time and expense in making a trip to Iowa to examine property upon which the estate held a mortgage and other property which had been offered in exchange for the mortgage, one hundred and seventy-five dollars for money paid for legal expenses incident to the foreclosure of a mortgage, and one hundred and twelve dollars for money paid to satisfy a lien for a city assessment laid for asphaltting a street in front of land belonging to the trust.

Stiles Judson, Jr., for the appellant.

Howard H. Knapp, for the appellee.

537 BALDWIN, J. It was the duty of the trustee to protect his interest under the Iowa mortgage. He was properly allowed to deduct from the income otherwise payable to Dr. Wordin the amount of his reasonable expenses in prosecuting the foreclosure suit brought by his predecessor and pending at the time of his appointment, as well as for those incident to his personal investigation of the mortgaged property and of that which had been offered to him in exchange for it. They were expenses attending the administration of the trust in ordinary course; and ordinary expenses of administration are properly deducted from the fruits belonging to the party in immediate enjoyment of the equitable estate. That these were large, either as considered by themselves or in comparison with the value of the mortgaged property, did not tend to prove that they were of such an extraordinary character as to make them a charge on the corpus of the trust estate. Evidence to that effect would have been pertinent, as was intimated by the trial court, to show that the expenditures should not have been made at all, because the asset was not worth what it would cost to protect and preserve it; but none was offered having such a purpose in view. It is the nature, object, and result, rather than the amount of an expenditure, which usually determines whether it is chargeable to a life tenant or to the remainderman. However large, if properly and reasonably incident to the management of the estate in behalf of the party equitably entitled to the accruing income, and not resulting in a direct increase of the principal fund, nor in substitutions which vary the items of which that is composed, a trustee's charges and disbursements are, under ordinary circumstances, payable from its income, if that be sufficient for the purpose, ⁵³⁸ unless it be otherwise provided by the terms of the trust: *Guthrie v. Wheeler*, 51 Conn. 207.

The same considerations, in the main, apply to the assessment for an asphalt pavement in Bridgeport in front of land belonging to the trust. The trustee was under a legal obligation for its payment: *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; Gen. Stats., sec. 3901. Had the improvement been shown to be of a permanent character, an equity might have arisen to an apportionment of the expense between the life tenant and the devisee in remainder, or for decreeing the payment of the lien out of the principal of the fund, and an annual charge thereafter of the interest on such payment against the income otherwise going to Dr. Wordin: *Plympton v. Boston Dispensary*, 106 Mass. 544. But in the absence of evidence

to show that this particular pavement had especial qualities of durability, the superior court might properly take judicial notice of the usual effect of time and use in our climate upon asphalt on the streets of a populous city. The life tenant is a man of middle age. The tables of mortality indicate that he may outlast the pavement, and the added value which it gives to the land be entirely exhausted in increasing the income which he enjoys. Remaindermen are not ordinarily chargeable for uncertain and conjectural benefits, which they may never receive.

The will under which the trust now in question was constituted contains nothing to vary the general rule. It is plain that a principal object of the testator was to provide for the ultimate accumulation of a fund of the value of one million dollars, for charitable purposes. This fund was to be kept forever intact, the income to be held back from time to time to replace losses, should such occur. The trust for his daughters was to terminate with their lives, and the half of the estate held for their benefit was to pass into the charitable bequest. Should either of his sons die without male issue, the share otherwise given to such issue was also to go in the same direction. The trust in favor of each of his four children respects only "net" income of the share set apart for that purpose. The prior trust in favor of his wife, under which ⁵³⁹ she had the benefit for her life of the entire residuary estate, gave her the balance of the accruing "rents, dividends, and interest," after payment by the executors of "the legal taxes, insurance, and necessary repairs on the buildings, and their legitimate expenses." These words may fairly be taken to indicate what the testator regarded as constituting "net income."

In creating the life estate in joint tenancy in favor of his daughters in part of the homestead, after his wife's decease, he was careful to provide that his executors were "to pay legal taxes and assessments thereon, and keep the same in repair, out of any funds belonging to my estate during said term." Here "assessments" are classed with taxes and repairs as charges which it was necessary to meet in order to assure to the life tenants the "free and unmolested use" of the premises, and which were to be paid from the general residuary estate, whether they occupied the house as a residence for themselves, or let it and took the rent.

Had the offer of an exchange for the Iowa mortgage been accepted by the trustee, it may be that the property thus acquired to replace it would have been a proper subject of appor-

tionment, and that it might have been equitable to charge the expenses of the western trip in whole or in part upon the corpus of the trust. The same might have been true if the decree of foreclosure had not been set aside. But as things were, neither the decree nor the unaffected exchange brought anything new to the estate or added to its amount.

The appellant claimed before the superior court that it was the duty of the trustee to convert the defaulted mortgage into productive property at the expense of the corpus of the estate. This raises a question not in the case. The foreclosure may have been brought and prosecuted simply as the best means of exacting payment of the interest in arrears. There has as yet been no conversion of the security into any other form of investment. Should one be hereafter effected, the occasion will then first arise for determining, in view of all the attending circumstances, what equity may require: *In re Tuttle*, 49 N. J. Eq. 259; *Greene v. Greene*, 19 R. I. 619, 622; *In re Park's Estate*, 173 Pa. St. 190. It does not now appear that any loss of principal has been incurred. It may be that the interest in default will yet be collected and the mortgage preserved intact.

There is no error.

In this opinion the other judges concurred.

ESTATES—WHAT CHARGEABLE TO LIFE TENANT AND REMAINDERMAN.—A special assessment for a local and permanent improvement should be borne ratably by the life tenant and remainderman in proportion to the benefit accruing to each, where such improvement increases the value of the remainder; but a special assessment for an improvement of a temporary character should be borne by the life tenant: *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, and note; *Thurston v. Dickinson*, 2 Rich. Eq. 317, 46 Am. Dec. 56. Taxes and repairs are paid by the life tenant out of the rents and profits from the estate: *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, and note. Where property is subject to an encumbrance, the tenant in possession may be required to pay the current interest out of the income from the property: *Note to Allen v. De Groodt*, 14 Am. St. Rep. 634; *Smith v. Barham*, 2 Dev. Eq. 420, 25 Am. Dec. 721.

BENNETT v. LATHROP.

[71 CONNECTICUT, 618.]

ASSOCIATIONS—VOLUNTARY—MEMBERSHIP.—That a person accepted the proposal of a voluntary association to become a member and to manage its polo team, it being understood that he should participate in the profits and losses equally with the other members, is sufficient to prove him a member of the association.

ASSOCIATIONS—LIABILITY OF MEMBERS.—The members of a voluntary association are individually liable for an in-

debtedness incurred in the business for which it was organized, during the time of their membership, although they did not agree to become, nor did they hold themselves out as, partners, or as personally responsible, and although the creditors gave credit to the associate name.

JUDGMENT—ASSIGNMENT.—The assignee of a judgment, which is vacated on appeal, takes no interest under the assignment.

Action to recover wages. Judgment against all the defendants. Appeal by Heineman alone to court of common pleas. The judgment of the justice's court was assigned to the plaintiff's counsel, Mr. Fowler, in trust to pay the avails of the judgment to a creditor of the plaintiff, Bennett, after payment to Fowler of his fees and disbursements.

Cornelius J. Danaher, for the defendant (appellant).

Oswin H. D. Fowler, for the plaintiff (appellee).

616 HALL, J. The Lakeview Athletic Club consisted originally of five or six of the defendants, who had associated themselves together under that name for the purpose of employing and managing a polo team for profit and pleasure.

The trial court has found that said members agreed to receive the defendant Heineman as a member, upon his own application, and to make him manager of the team; and that having been notified of said action he accepted the proposal and became a member, it being understood by all the parties that he should participate in the profits and losses equally with the other members. Upon these facts the court was justified in holding that Heineman was a member of the association.

The indebtedness to the plaintiff's several assignors having been incurred by the association in carrying on the business for which it was organized, and having been contracted by those in authority, while Heineman was a member of the club, he, like the other members, became individually liable for those debts, though they did not hold themselves out to be partners or to be individually liable, and although there was no agreement between themselves that they should be partners or should become personally liable for the debts of the club, and although the players so employed gave credit to the associate name: *Davison v. Holden*, 55 Conn. 103, 3 Am. St. Rep. 40.

The omission in the complaint of the averment, required by statute, that the plaintiff was the actual and bona fide owner of the several choses in action, was a formal defect of pleading which could only have been taken advantage of by demurrer:

Wall v. Toomey, 52 Conn. 35, 39; Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579; Merwin v. Richardson, 52 Conn. 223; Donaghue v. Gaffy, 53 Conn. 43.

If the assignment to plaintiff's attorney had been of the original right of action, instead of the judgment, the plaintiff would still, from the purpose and nature of the assignment, have retained sufficient interest in it to enable him to maintain the suit: Saugatuck Bridge Co. v. Westport, 39 Conn. 337, 349. But the assignment to Mr. Fowler was, in fact, of the judgment rendered by the justice of the peace, and that judgment, in so far as it affected the defendant Heineman, ⁶¹⁷ having been vacated by the appeal to the court of common pleas, Mr. Fowler had thereafter under the assignment no interest in any claim against Heineman.

The telegram sent by Heineman to Smith was properly received in evidence for the purpose for which it was offered. It tended to prove that Heineman, in employing players and acting as a manager of the polo team, was performing duties which were rather those of a member of the association than of a mere player of the team.

We are unable to see how the defendant was injured by the failure of the court to consider the plaintiff's motion to open the case for the presentation of further evidence.

There is no error.

In this opinion the other judges concurred.

ASSOCIATIONS—VOLUNTARY—LIABILITY OF MEMBERS. Members of a committee of a voluntary association are individually liable on a contract made by a subcommittee of their numbers, under authority delegated by the whole committee, with one who contracted on the credit of the committee personally, and not of the association, although, in making the contract, the subcommittee assumed to act as officers of the association: Fredendall v. Taylor, 23 Wis. 538, 99 Am. Dec. 203, and note; Davison v. Holden, 55 Conn. 103, 3 Am. St. Rep. 40, and note. See the extended note to Otto v. Journeyman Tailors' etc. Union, 7 Am. St. Rep. 161.

JUDGMENT—ASSIGNMENT.—A judgment recovered in an action for a tort is not assignable before it comes into being, that is, before it has been rendered or entered up, although a verdict has been returned upon which judgment can be and is afterward signed: Gamble v. Central R. R. etc. Co., 80 Ga. 595, 12 Am. St. Rep. 276.

BARTRAM v. SHARON.

[71 CONNECTICUT, 686.]

NEGLIGENCE, WHAT IS.—One cannot be guilty of negligence, unless through some act or omission of his own, or through that of his servant or agent.

NEGLIGENCE.—WHEN THE CULPABLE NEGLIGENCE of each of two persons is the proximate cause of injury to another, the injured party may recover his whole damage from either or both of the wrongdoers.

NEGLIGENCE—CONTRIBUTORY—BURDEN OF PROOF. In Connecticut, in actions based upon negligence, the burden of proof is upon the plaintiff to show the use of ordinary care upon his part.

HIGHWAYS—DUTY TO MAINTAIN.—The duty imposed upon towns to construct and maintain highways is a governmental duty, for a violation of which no action lies by a private individual, unless authorized by statute.

HIGHWAYS—DEFECTS IN—ACTION FOR INJURIES BY.—A STATUTE, providing that any person injured by means of a defective road or bridge may recover damages therefor, is penal in its nature, and must be strictly construed.

HIGHWAYS—LIABILITY OF TOWNS.—If there are two efficient, independent proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received through such defect, and the town is not liable therefor.

HIGHWAYS—INJURY BY DEFECT IN—STATUTORY CONSTRUCTION.—A traveler on a highway cannot be injured through a defect in the highway, within the meaning of a statute giving a right of action against a town for an injury caused by a defective road or bridge, when the culpable negligence of a fellow traveler is a proximate cause of his injury.

HIGHWAYS—DEFECTS IN—INJURY CAUSED BY.—An injury caused by the culpable negligence of a traveler, whether to himself or to another, does not happen by means of or through a defect in the highway, even if such defect were a concurring cause.

Action to recover damages for personal injuries claimed to have been caused by a defective highway. Judgment for the plaintiffs. The plaintiff, Mrs. Bartram, was a gratuitous passenger on the wagon of Mr. St. John, who drove his own team. The wagon, in going over a stone sluice, ran off the end of it, and was overturned, by reason of which the plaintiff was injured. The evening was dark, but Mr. St. John was familiar with and could see the road. The highway was defective, and the town had neglected to repair the defect. Mr. St. John was negligent in driving, and this, coupled with the defect in the highway, caused the injury.

Arthur D. Warner and Leonard J. Nickerson, with whom was James Huntington, for the defendant.

Donald T. Warner and Howard F. Landon, for the plaintiffs.

⁶⁸⁸ HAMERSLEY, J. The facts found by the trial court do not support the judgment, whatever view may be taken of the other rulings claimed as erroneous. It is certainly true that one cannot be guilty of negligence, unless through some act or omission of his own or through that of his servant or agent: *The Bernina*, L. R. 12 Prob. Div. 58; *Little v. Hackett*, 116 U. S. 366; *Randolph v. O'Riordon*, 155 Mass. 331, 336, The obiter dictum cited from *Peck v. New York etc. R. R. Co.*, 50 Conn. 379, 392, does not affect this settled law. It is also true that when the culpable negligence of each of two persons is the proximate cause of injury to another, the injured party may recover his whole damage from either or both of the wrongdoers: *Burrows v. March Gas etc. Co.*, L. R. 5 Ex. 67, 71; *Carstensen v. Stratford*, 67 Conn. 428, 435. This conclusion is based upon the common law of negligence. By that law every person is bound to exercise ordinary care in respect to his acts or omissions that may endanger others. If he neglects to use this ordinary care he is legally in fault; he violates a legal duty which he owes to each person who may be exposed to the danger; that person has a correlative right to the performance of such duty and, if injured through such fault as the proximate cause, he has a right of action to recover damages of the wrongdoer. The party injured, however, is subject to the same law. He owes the same duty of ordinary care. If he violates that duty he is likewise in fault; and the person damaged through his fault has a right of action against him. When, therefore, mutual damage is the result of the concurrent fault of two persons, each has ⁶⁸⁹ suffered for the other's wrong. The equitable rule is that each should suffer in damages in proportion to his wrong. This rule is, under certain circumstances, applied in courts of admiralty: *Woodrop-Sims*, 2 Dod. 83, 85. It is to a certain extent applied at law in some states, under the questionable theory of "comparative negligence": *Chicago etc. Ry. Co. v. Gretzner*, 46 Ill. 74, 83; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180; *Augusta etc. R. R. Co. v. McElmurry*, 24 Ga. 75, 80. It has more or less influenced the results reached in many decisions. But courts of law do not administer such equitable rule. In *Heil v. Glanding*, 42 Pa. St. 493, 499, 82

Am. Dec. 537, the opinion of the court, delivered by Justice Strong, gives as the reason, "that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault." In *The Bernina*, L. R. 12 Prob. Div. 89, Lindley, L. J., says: "But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled." Perhaps the main reason is that a trial by jury is unfitted for the safe administration of the rule. Possibly, the principle that there shall be no contribution between joint wrongdoers may have had some influence. But whatever the reason may be, law courts have adopted the more practicable rule that when the fault of the plaintiff concurs with the fault of the defendant as a proximate cause of the injury, the plaintiff shall recover nothing. This concurrence of the fault of two wrongdoers by which one of them is injured is called contributory negligence on the part of the injured party. In several of our states this arbitrary rule has been treated as constituting, not a defense, but a condition precedent to any right of action. Where the rule is so treated, the burden of proof is on the plaintiff to show use of ordinary care on his part. Such is the law in this state, and in *Park v. O'Brien*, 23 Conn. 339, 345, Chief Justice Storrs says: "If the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence"; although it did in fact occur by reason of the negligence of each—and this suggests the theory of contributory negligence. The ⁶⁹⁰ plaintiff in such a case, as was said by Lindley, L. J., in *The Bernina*, L. R. 12 Prob. Div. 89, "cannot with truth say that he has been injured by the defendant's negligence; he can only with truth say that he has been injured by his own carelessness and the defendant's negligence, and the two combined give no cause of action at common law." If, however, the plaintiff is injured by means of the negligence of A and B, each being a proximate cause, he has a right of action at common law, notwithstanding he cannot say with truth as to either one that he was injured by his negligence. In such a case, as we have already seen, the injured party can recover his whole damage from either or both of the wrongdoers. The essence of the law is that a tortfeasor is responsible for the proximate effect of his tort; and that responsibility is not changed by the fact that other tortfeasors are also responsible for the same injury.

The rule of contributory negligence is an exception to the

general law. But this law of negligence has no application to the present action, which is not an action of negligence but an action on a statute. We have not here the case of a party injured by the negligence of two wrongdoers. The town has committed no tort against the plaintiff. It is the statute only, which entitles the plaintiff to compensation for his injury when that injury is caused through or by means of a defect in the highway. If the negligence of himself or of a third person is also a proximate cause, he cannot say with truth that he was injured by the defect; he can only say with truth that he was injured by his own or another's carelessness and the defect, and the two combined give no cause of action under the statute.

This distinction is stated in *Eaton v. Boston etc. R. R. Co.*, 11 Allen, 500, 505, 87 Am. Dec. 730. After holding that each of two wrongdoers is liable to the injured party for injury caused by his negligence combining with that of the other, the court says: "The cases cited by the defendants, in opposition to these propositions, against towns for injuries occasioned by defects in highways, are reconciled by the consideration that this liability of towns is wholly statutory; and, by the construction ⁶⁹¹ given to the statute, no action can be maintained unless the injury arises wholly from the defect." The Massachusetts statute in respect to the duty and liability of towns in the repair of highways is similar to our own, derived from an ancient statute expressed in substantially the same language as that used in the ancient statute from which our own is derived. It has uniformly been held in that state that an injury resulting from the negligence of a third person in connection with a defect in the highway, does not happen by reason of the defect, within the meaning of the statute: *Rowell v. Lowell*, 7 Gray, 100, 66 Am. Dec. 464; *Kidder v. Dunstable*, 7 Gray, 104, 105; *Shepherd v. Chelsea*, 4 Allen, 113; *Richards v. Enfield*, 13 Gray, 344, 346; *Eaton v. Boston etc. R. R. Co.*, 11 Allen, 500, 505, 87 Am. Dec. 730. The rule is thus stated by Chief Justice Shaw: "Upon the true construction of the statute the town is responsible only for the direct and immediate loss occasioned by a defect in the highway; and it follows as a consequence that if the damage arises from a more remote cause, or from any efficient concurring cause, without which it would not have happened, or from pure accident, in either case it is not a loss for which the town is responsible": *Marble v. Worcester*, 4 Gray, 395, 401.

The state of Maine was formerly within the jurisdiction of Massachusetts, and its courts have construed a similar statute

in the same way: *Moulton v. Sanford*, 51 Me. 127, 129; *Perkins v. Fayette*, 68 Me. 152, 154, 28 Am. Rep. 84. The rule is expressed in the headnote to *Moulton v. Sanford*, 51 Me. 127: "If there are two efficient, independent proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received 'through such defect'; and the town is not liable therefor. And it makes no difference that the traveler himself was in no fault."

The question in this form is now before us for the first time. The decisions of the courts of Massachusetts and Maine in construing the same statute are entitled to very great weight. A similar construction has been given to the ⁶⁹² Wisconsin statute: *Hawes v. Fox Lake*, 33 Wis. 438, 442. A different view seems to prevail in New Hampshire: *Winship v. Enfield*, 42 N. H. 197. Our determination of the meaning of our own statute must be controlled by the reason rather than the authority of decisions in other states. We think the view taken in Massachusetts, so far as it affects the question before us, rests upon solid reason.

The construction and maintenance of highways is a governmental act, controlled by the sovereign law-making power. When its exercise is imposed upon a territorial corporation, such corporation is a governmental agent, and is not responsible as a private corporation to any individual in respect to its neglect to execute the power. A failure to obey the law may be a public wrong, but cannot be a private wrong. Such public wrong has no answering rights in individuals, and therefore cannot be the subject of a civil action, unless made so by statute. When a statute creates a right of action in respect to such public wrong, the nature and extent of the action depends solely on the statute. The statute may turn the public wrong into a private wrong, and in broad terms make the corporation liable as a private corporation for common-law negligence; in such case, the action authorized would differ little from the common-law action of negligence. This seems to be the result of highway legislation in many of the states, and in those states an action to recover for injury caused by a defect in the highway is properly treated as substantially a common-law action of negligence. But if the statute does not change the character of the public wrong, and simply imposes a penalty measured by the actual injury caused by disobedience of law, to be enforced by

the party injured through an action on the statute, then the action so authorized is not an action of negligence, but an action on the statute to enforce a penalty; and the liability created depends on the commission of the very act for which the penalty is imposed.

Such is the nature of our statute enforcing the duty of towns to maintain highways in sufficient repair. This purpose and effect of our statute is conclusively settled by many ⁶⁹³ decisions. The obligation resting upon towns in the maintenance of highways "is not imposed by the common law, but is wholly a creature of the statute": *Chidsey v. Canton*, 17 Conn. 475, 478. "No obligation rests upon any territorial or municipal corporation in this state by the common law to lay out, construct, or repair highways, and no application can be made to any court to enforce such obligation, unless it is imposed and the process is given by express statutory provision": *Stonington v. States*, 31 Conn. 213, 214. "This is not an ordinary action of tort, but an action founded on an express statute": *Burr v. Plymouth*, 48 Conn. 460, 472. It is well settled that a town "is not liable for injuries from a defect in the highway, except as made so by statute": *Beardsley v. Hartford*, 50 Conn. 529, 537, 47 Am. Rep. 677. Other cases might be cited, but it is unnecessary. We have recently said: "That the duty imposed by the statute upon the defendant [a town] is a governmental duty; that the liability imposed for a breach of that duty is wholly a statutory one; and that the damages to be recovered for injuries resulting from such a breach can be only such as are prescribed by the statute, are propositions so well established that it would be superfluous to cite authorities in support of them": *Lounsbury v. Bridgeport*, 66 Conn. 360, 364. This duty and liability "is imposed by statute, or it does not exist": *Daly v. New Haven*, 69 Conn. 644, 648.

In 1643, the towns were ordered to appoint officers to look to the highways, who were given power to impress for one day in each year every team and person fit for labor, to mend the highways: 1 Col. Rec. 91. In 1672, the general court, "considering the great danger that persons, horses, and teams are exposed unto, by reason of defective bridges and country (i. e. general or colonial as distinguished from purely town) highways in this jurisdiction," ordered the several townships within the colony to keep in sufficient repair all the highways within their townships; and, to enforce this governmental duty, it was provided: 1. That if it should so happen that any person should lose his

life through the defect or insufficiency of any highway in passing over the same (due warning ⁶⁹⁴ having been given of such defective highway), then the town should pay a fine of one hundred pounds to his family; 2. If it should happen that any person should lose a limb or sustain other bodily injury, through or by means of such defect aforesaid, the town through whose neglect such hurt is done should pay the party injured double damages; 3. The like satisfaction shall be made for any team, et cetera, to the owner thereof in proportion to the damage sustained as aforesaid. It was further provided, "for the prevention of danger which may come by the insufficiency" of highways, that the town may have process to impress the workmen required for any needful repairs. These forfeitures and damages were to be recovered by action, bill, plaint or information: Acts 1672, p. 7. This act appears substantially unchanged in the Compilation of 1808, page 119, also in the Revision of 1821, page 266, the penalty of "double damages" being changed to "just damages." In the Revision of 1849, pages 416, 417, the fine for loss of life is omitted; the language does not otherwise substantially differ from that in the Revision of 1821. The Revision of 1866, page 493, follows that of 1849. In the Revision of 1875, pages 231, 232, the language used in that of 1866 is somewhat altered, for the sake of condensation. The General Statutes of 1888, sections 2666, 2672, follow the Revision of 1875. The penalties have been modified and altered in succeeding revisions, but, as affecting the duty and liability of the towns, the act of 1672 is in force to-day: *Lounsbury v. Bridgeport*, 66 Conn. 365. See, also, Revision of 1875, p. 332, note.

Such an act should not be extended by construction beyond the plain meaning of its words. The liability of the towns is to pay a penalty. In *Moulton v. Sanford*, 51 Me. 129, the court, in speaking of a similar statute, Davis, J., delivering the opinion, says: "The statute is in its nature penal, as well as remedial, and ought to be construed strictly" (perhaps this modification should be added: in respect to its penal provisions); the duty to repair is mainly remedial. The conditions upon which this penalty is incurred, are these: 1. A defect in the highway, i. e., by want of sufficient repair it is unfit for safe use as a highway; 2. A failure or neglect by ⁶⁹⁵ the town to make such sufficient repair; involving the questions of reasonable notice and knowledge, and reasonable time; 3. An injury caused through or by means of the defect; 4. Such injury to a person "in passing over a highway," i. e., while in the lawful use of the way. The au-

thorities are conclusive that the protection given by the state extends only to those persons for whose common use the highway was established: *Wilson v. Granby*, 47 Conn. 59, 73, 36 Am. Rep. 51; *Ward v. North Haven*, 43 Conn. 148, 154; *Gregory v. Adams*, 14 Gray, 242, 248; *Blodgett v. Boston*, 8 Allen, 237; *Richards v. Enfield*, 13 Gray, 344, 346; *Hawes v. Fox Lake*, 33 Wis. 438; *Harper v. Milwaukee*, 30 Wis. 365, 371; *Holman v. Townsend*, 13 Met. 297, 299. In the last case Chief Justice Shaw says: "The construction, which has been put on this provision . . . is, that it must be a damage sustained in using the road, and also in using it with due care and skill." Other cases may be cited in these states and in Maine and Vermont. All these conditions must concur before the town is liable for any penalty. It follows that an injury caused by the culpable negligence of a traveler, whether to himself or to another, does not happen by means of or through a defect in the highway, even if such defect were a concurring cause. One reason why a person injured through his own carelessness cannot maintain an action against the town is, that the injury caused by his own carelessness is not through or by means of the defect. This reason applies with equal force when the injury is caused through the carelessness of a third person. If the language of the statute had been used in reference to a common-law tort, it might well be claimed that it is broad enough to cover an injury resulting from two combining torts; for in that case the controlling question would be, Has the defendant committed a tort? But the language is not so used; it does not refer to a common-law tort. There is, therefore, no question involved as to the liability of the town for a wrong which cannot be defeated by any concurring wrong; the language is simply defining the conditions of a statutory penalty, and when it says that penalty shall arise in case of an injury caused through or by ⁶⁹⁶ means of a defect in the highway, it is an extension of the natural meaning of the words to include an injury caused by the wrongful act of a third person and such defect. It cannot with truth be said that the injury is caused by the defect. This appears more clearly in considering the other purpose of the act, which is intended not merely to stimulate towns to the performance of a governmental act by imposing a penalty for failure, but also to indemnify against the dangers of an insufficient highway all who put it to its proper use. And so the amount of the penalty is given by the state to the party injured. This is a gift of state money raised by taxation for government

purposes. It is immaterial whether the money is raised by a state tax or a town tax; whether the amount is adjusted and awarded upon application to state officers, or upon an action on the statute against the town; in either case it is a gift from the state. But it is only those who are injured in passing over the highway by reason of a defect, who are thus indemnified. When the state says we will give certain persons who are injured through defects in the highway, a just compensation, it by no means follows, and ought not to be implied, that the terms of this gift include those who are really injured by the illegal acts of other persons responsible for their wrongs. The state protects the traveling public from unnecessary defects; but not from each other's carelessness while in the common use of the way.

When, therefore, in this case the superior court finds that the wrongful act of the plaintiff's driver is a proximate cause of her injury, it finds a fact inconsistent with the liability of the town; and upon the facts found judgment for the defendant is the conclusion of the law.

The plaintiffs place much reliance on a dictum in *Carstesen v. Stratford*, 67 Conn. 428. The dictum is a correct statement of the common law. It was used only by way of illustration or analogy. The case was decided upon a special act making two corporations liable for the same defect. The question now before us was not considered.

The rule as to a town's liability does not necessarily apply to private corporations responsible for the repair of highways; ⁶⁹⁷ as to them, or some of them, the statutory obligation may be in affirmation of a common-law liability for negligence: *Goshen etc. Co. v. Sears*, 7 Conn. 86, 93. But that question is not now involved.

Nor are we concerned in this case with the effect of accident as a partial cause of an injury. Almost every injury from a defect in a highway, which is not induced by wrongful human agency, must to some extent be the result of accident. The words of the statute, while their meaning ought not to be extended, must receive a reasonable construction. The exclusion of every injury in which the law of chances plays any part, would hardly be reasonable. On the other hand, the accident may be of such a nature, so direct and separate in its operation, that the defect in the highway cannot fairly be said to have been the essential cause of injury. The case of *Baldwin v. Greenwood's Tp. Co.*, 40 Conn. 238, 16 Am. Rep. 33, claimed to

be inconsistent with our view, can be supported as to the very point decided, without adopting all the discussion of the opinion relative to accident. Whether that discussion is affected, or to what extent it may be affected, by our present decision, need not now be considered. The precise point decided in this case is, that a traveler on a highway cannot be injured through a defect in the highway, within the meaning of our statute, when the culpable negligence of a fellow traveler is a proximate cause of his injury. We think this construction is demanded by the language and history of the act, and also that it is in accord with sound public policy.

The duty imposed upon towns in the repair of highways, however necessary it may be, is a very onerous one and operates more harshly to-day than formerly; there are several means provided by statute for compelling a performance of this duty; the liability to the unlimited penalty of indemnification ought not to be extended beyond the obvious justice which may support it; and certainly no just necessity requires the state to offer to those composing the traveling public indemnity at the expense of the towns, for injuries resulting from the culpable negligence of each other.

There is error, the judgment of the superior court is ⁹⁹⁸ reversed, and the cause remanded that judgment may be rendered in accordance with this opinion.

In this opinion the other judges concurred.

NEGLIGENCE, CONCURRENT OF TWO PERSONS.—When an injury occurs through the concurrent negligence of two persons, and would not have happened in the absence of either, the negligence of both is the proximate cause of the accident, and both are answerable: *City Electric etc. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, and note. See *Cook v. Minneapolis etc. Ry. Co.*, 98 Wis. 624, 67 Am. St. Rep. 830.

NEGLIGENCE—CONTRIBUTORY—BURDEN OF PROOF.—One who seeks damages for an injury caused by another must, at least, prove some fact or circumstance, showing that he was not himself guilty of negligence contributing to the injury: *Evansville Street R. R. Co. v. Gentry*, 147 Ind. 408, 62 Am. St. Rep. 421. *Contra*, *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436, 52 Am. St. Rep. 896, and note; *Rolseth v. Smith*, 38 Minn. 14, 8 Am. St. Rep. 637.

HIGHWAYS—DUTY TO MAINTAIN—LIABILITY OF TOWNS. Incorporated towns and cities owe a duty to the public to keep their streets in repair, but, in the absence of a statute, the town or city is not liable in a civil action for an injury resulting to a party from a neglect to keep them in repair: *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32; *Buchanan v. Barre*, 66 Vt. 129, 44 Am. St. Rep. 829, and note. *Contra*, *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847.

HIGHWAYS—LIABILITY OF TOWNS FOR DEFECT IN.—When the negligence of a township in allowing a highway to remain out of repair concurs with an extraordinary outside cause in producing an injury, the township is not liable, but the concurrence of an ordinary outside cause with such negligence will not so relieve it: *Schaeffer v. Jackson Township*, 150 Pa. St. 145, 30 Am. St. Rep. 792, and note; *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, and note; *Burrell Township v. Uncapher*, 117 Pa. St. 353, 2 Am. St. Rep. 664. The rule laid down in the principal case does not seem to be supported by the weight of authority in New England.

BURNS & SMITH LUMBER COMPANY v. DOYLE.

[71 CONNECTICUT, 742.]

NEGOTIABLE INSTRUMENTS—WRITTEN ACCEPTANCE—ORAL EVIDENCE TO VARY.—An absolute and unqualified written acceptance of a bill of exchange cannot be cut down to a conditional one, even by the clearest proof of a contemporaneous oral agreement to that effect.

NEGOTIABLE INSTRUMENTS—ACCEPTANCE—ORAL EVIDENCE TO VARY.—If the written acceptance of a negotiable instrument was delivered to the plaintiff upon an oral condition, assented to by him, that it was not to become operative, or have any existence at all as an acceptance, until the happening of a condition, that condition, if proved, would avail the defendant, and under proper pleadings evidence of such a conditional delivery would be admissible.

CONTRACTS IN WRITING—EVIDENCE TO VARY.—Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

NEGOTIABLE INSTRUMENTS—ACCEPTANCE—PLEADING ORAL AGREEMENT TO VARY.—An answer which alleges that an absolute written acceptance was made upon an oral condition that the defendant should not be called upon to pay it, or be liable upon it, except in a certain stated contingency, sets up a conditional oral acceptance, and not a conditional delivery of an acceptance, and is, therefore, of no benefit to the defendant.

Action by the payee against the acceptor of a bill of exchange. The lower court found that one Mills was the drawer of the bill in suit, the plaintiff being the drawee. The defendant agreed to accept the order upon condition that it should not become obligatory upon him to pay the same until Mills should complete a house he was building for the defendant, when the amount of the bill would be due Mills, the defendant then owing Mills nothing. The defendant accepted the bill in writing. Mills did no more work upon the house, and it was completed by another. There was no consideration for the acceptance, other than is stated above. The plaintiff objected to the introduction of oral evidence to prove the foregoing facts, except the fact of acceptance.

Louis K. Gould, for the appellant (plaintiff).

John J. Phelan, for the appellee (defendant).

745 **TORRANCE, J.** The acceptance sued upon is in writing, and is an absolute and unqualified one, as distinguished from a conditional one. It is well settled that in an action at law such an acceptance cannot be cut down to a conditional one, even by the clearest proof of a contemporaneous oral agreement to that effect. Such an agreement, however conclusively proved, would not avail the defendant for such a purpose, and therefore all evidence of it is excluded: *Osborne v. Taylor*, 58 Conn. 439; *Averill v. Sawyer*, 62 Conn. 560; *Caulfield v. Hermann*, 64 Conn. 325; *Hills v. Farmington*, 70 Conn. 450, 453.

But if the written acceptance was delivered to the plaintiff upon an oral condition assented to by the plaintiff, that it was not to become operative, or have any existence at all as an acceptance, until the cottage was completed and the money became due to Mills, that condition, if proved, would avail the defendant, and under proper pleadings evidence of such a conditional delivery would be admissible: *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111; *Trumbull v. O'Hara*, 71 Conn. 172; *Michels v. Olmstead*, 157 U. S. 198; *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871; *Pym v. Campbell*, 6 El. & B. 370; *Pattle v. Hornibrook* (1897), L. R. 1 Ch. Div. 25.

The general rule applied in the former class of cases is, that a prior or contemporaneous oral agreement intended to add to or cut down or vary a written agreement is without legal effect. It is founded on the principle that the writing expresses the final views of the parties to the exclusion of all extrinsic, prior, or contemporaneous agreements or understandings. It is a salutary rule and should be strictly adhered to.

The rule applied in the latter class of cases is, that you may show that a writing purporting to be a contract never came into existence as a contract, or has ceased to be a contract, and may show this, of course, by evidence outside of the writing. This latter rule is not an exception to the former nor an infringement of it.

The practical distinction between the two rules was tersely stated by Erle, J., in *Pym v. Campbell*, 6 El. & B. 370, as follows: **746** "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." Where a defense of this kind is set up in a case in

which the written contract has been actually delivered to the other party, as in this case, the proof of conditional delivery ought to be clear and strong. In such case, possession of the contract by the other party is *prima facie* evidence of an unconditional delivery: *McFarland v. Sikes*, 54 Conn. 250, 251, 1 Am. St. Rep. 111.

In the court below, the defendant claimed that the acceptance sued upon came within the latter class of cases, and he therefore claimed the right to show, not a conditional acceptance, but a conditional delivery of an acceptance; a delivery under the terms of which the writing signed by the defendant never became a contract at all. The defendant claimed the right to prove such a delivery under the pleadings.

The plaintiff claimed that evidence of such a delivery was not admissible under the pleadings, and the court overruled this claim, and against the plaintiff's objection admitted the evidence; and one of the questions upon this appeal is whether the court erred in so doing.

Leaving out of view for the present the defense of want of consideration, we think the answer sets up a conditional oral acceptance, and not a conditional delivery of an acceptance. It alleges, in effect, that the absolute written acceptance was made, but was made upon an oral condition that the defendant should not be called upon to pay it, or be made liable upon it, except in a certain stated contingency. This is nothing more or less than an allegation of the existence of a contemporaneous oral agreement that the absolute, written acceptance should be treated as a conditional one. The defense in question contains no hint that the acceptance was delivered conditionally, within the meaning of the cases upon which the defendant relies. It is analogous to the defenses set up in *Osborne v. Taylor*, 58 Conn. 439, and in *Beard v. Boylan*, 59 Conn. 181, which were held to be demurrable, because ⁷⁴⁷ they each set up a contemporaneous oral agreement to affect a written contract. On the same ground we think the defense in question could not have stood the test of a demurrer. Under this defense, then, the defendant was not entitled to prove such a conditional delivery as he claimed, because that fact, if it existed, was not within the issue, and evidence of it should have been excluded.

Furthermore, in this view of the matter, if the facts found are to be regarded as establishing a conditional delivery of the acceptance, the finding goes entirely outside of the issue, and such a finding furnishes no support for a judgment based upon

facts so found: *Atwood v. Welton*, 57 Conn. 514; *Ives v. Goshen*, 63 Conn. 79.

The plaintiff further claims that even if the facts found were provable under the pleadings, yet the finding does not show a conditional delivery of the acceptance, as distinguished from a conditional acceptance. Upon this point the finding is not free from doubt, but we think the fair import of it is that the acceptance was delivered upon a condition that it was not to take effect at all as an acceptance except upon a stated contingency. That was the ground upon which the judgment was based, and apparently the sole ground; and taking the record as a whole we think the finding is that the delivery was conditional.

As there must be a new trial for the reasons already given, we deem it unnecessary to consider or decide the questions raised by the defense of want of consideration for the acceptance.

There is error and a new trial is granted.

In this opinion the other judges concurred.

NEGOTIABLE INSTRUMENTS—ACCEPTANCE—EVIDENCE TO VARY.—The general rule is, that it is not competent for the acceptor of a bill of exchange to contradict the written contract by proof of an oral agreement that he accepted upon the condition that he should not be called upon to pay according to the tenor of the paper: *Note to Credit Co. v. Howe Machine Co.*, 1 Am. St. Rep. 137. Evidence is admissible, in an action on a negotiable promissory note signed by one person only, that the instrument was not to become operative as a note until another person also signed it; and evidence that such condition has not been complied with does not violate the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument: *McCormick etc. Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839, and note. See the extended note to *Bedell v. Herring*, 11 Am. St. Rep. 314, where is discussed the question of instruments put in circulation in violation of instructions or conditions. See, also, *Bryan v. Duff*, 12 Wash. 233, 50 Am. St. Rep. 889.

CONTRACTS IN WRITING—EVIDENCE TO VARY.—The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to a written contract which is in force as a binding obligation: *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, and note.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BEACH v. AVERETT.

[106 GEORGIA, 78.]

PROCESS—DISTRESS WARRANT—AMENDMENT.—Although a jurat is not attached to an affidavit in a distress warrant for rent, the warrant is not void. It may be amended when the oath was actually taken before the magistrate issuing the warrant.

PROCESS—DISTRESS WARRANT FOR RENT IS NOT VOID because made returnable "to the next term of court," without designating what particular court, when the magistrate issuing the warrant has jurisdiction of the entire subject matter of the suit.

J. J. Bull, for the plaintiff in error.

74 LEWIS, J. It appears from the record in the present case that the oath upon which the justice's warrant for rent issued was in writing, and was in the usual form of an affidavit for rent due by a tenant to his landlord. The writing itself recites that the affiant appeared before the magistrate, the name of the magistrate and his official designation being given. This written oath was signed by the affiant, who was the plaintiff below, but there was an absence of the officer's signature to the certificate that it was sworn to and subscribed before him. Following the affidavit was the distress warrant for rent, which recited on its face that the affiant made affidavit before the officer whose signature is attached to the warrant, and whose name appears in the body of the written oath.

1. The question before us for decision is, whether or not the absence of the jurat from such oath renders the entire proceeding absolutely void. To constitute a complete affidavit, three essential features are requisite: 1. The written oath embody-

ing the facts sworn to by the affiant; 2. The signature of the affiant thereto; and 3. The jurat or attestation, by an officer authorized to administer the oath, that the affidavit was actually sworn to and subscribed before him by the affiant. We think it is a matter of some significance in this case that, under section 4818 of the Civil Code, the justice may issue "a distress warrant for the sum claimed to be due, on the oath of the principal, his agent or attorney, in writing." The word "affidavit" is not used in this section, nor is there any special requirement that this written oath should be attested by the officer before whom it was taken. In *Hyde v. Adams*, 80 Ala. 111, it was held that: "If an affidavit for an attachment is in fact made before the officer who issues the writ, it is not necessary that it shall be signed or certified by him; and a plea in abatement, 'because it was not signed by the clerk,' presents an immaterial issue." In the opinion delivered in that case by Clopton, J., it will be seen that this decision of the court was based upon a statute of the state which required the oath to be reduced to writing, and subscribed by the party, but was silent as to certification by the officer. But it is not necessary to base our decision in this case upon a like omission in the Georgia statute. Even construing the term "oath . . . in writing," in the section of the code above recited, as meaning a formal affidavit, we do not think the absence of the officer's signature from the affidavit necessarily renders the proceeding absolutely void. The object of such a certificate is to furnish written evidence that the oath was actually taken by the affiant. It is not to be presumed, therefore, that the oath was actually administered without such proof appearing upon the face of the papers. It does not follow, however, that this is the only possible proof that is admissible upon the subject. In the case of *Pottsville v. Curry*, 32 Pa. St. 443, it was held: "An appeal from an award of arbitrators is not vitiated by an omission of the prothonotary to attest the jurat, if the record show that the affidavit was in fact made." Strong, J., in his opinion in that case on page 444, says: "It [the jurat] affords evidence that the oath was taken, but it is not the only possible evidence. When, therefore, the paper filed, being in form an affidavit, was found without attestation, it was competent for the appellant to show by other evidence that the oath was made." In *Cook v. Jenkins*, 30 Iowa, 452, it was ruled: "Proceedings in attachment cannot be successfully attacked on the ground that the jurat to the affidavit is not signed by the of-

ficer administering the oath, if it be shown that the affidavit was in fact sworn to before him." It will thus be seen from authority that even where an affidavit constitutes the basis of a proceeding in court, and is essential to the validity of its processes, it is not indispensable that the jurat should be signed by the officer who administered the oath, the material question being whether or not the oath was actually administered and taken; ⁷⁶ and, in the absence of the officer's certificate to this effect, aliunde testimony may be received to establish this material fact. In accord with this principle is the decision of this court in *Veal v. Perkerson*, 47 Ga. 92, where there was a failure of the officer to sign the jurat to an affidavit, and it was ruled that the judge committed no error in permitting the magistrate to sign the jurat *nunc pro tunc*, as he had other evidence before him that the oath had been actually administered. In *Smith v. Walker*, 93 Ga. 252, it is decided that, the jurat being no part of the affidavit, a general demurrer to its sufficiency will not reach a defect in the jurat, such as failure to add to the name of the person who administered the oath his official designation. This was an affidavit of illegality to an execution. Especially will this rule not be relaxed in Georgia, on account of the liberality allowed by the statute to litigants amending their pleadings, extending not only to ordinary petitions, answers, and pleas in court, but also to affidavits which constitute the foundation of summary process: Civ. Code, sec. 5122. The better practice would be to require the magistrate, after proof of due administration of the oath, to attach his certificate to the jurat *nunc pro tunc*. We do not believe, however, that this is absolutely indispensable to the legality of the proceeding, and will not reverse the judgment below because no such motion was made by plaintiff in the distress warrant, no point being made thereon in the argument of the case here.

2. We find nothing in the statute which requires the officer issuing the distress warrant to make it returnable in the body of the warrant to any particular court. The law imposes upon the officer executing the warrant the duty of returning it to the proper court, but imposes no obligation upon the justice issuing it to embody this mandate in the warrant itself. But, even if it did, we think the following words in the warrant before us sufficient to meet such requirement: "And have you the said sums of money, together with this warrant, before the next justice's court to be held on the second Saturday in Janu-

ary, 1896, to render to the said Averett." The justice who issued the warrant having jurisdiction of the sum involved, a fair interpretation of these words is that his intention was to make the paper returnable to his court.

Judgment affirmed.

All the justices concurring, except Lumpkin, P. J., and Little, J., absent.

PROCESS—AMENDMENT—SEAL.—Courts have inherent power over their process, and may allow clerical errors and omissions by inadvertence to be amended at any time outside of statutes enabling them to amend: *Miller v. Zeigler*, 44 W. Va. 484, 67 Am. St. Rep. 777, and note. All voidable process can be made perfect by proper amendments, but void process cannot be: *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275. A citation from which the clerk's seal has been omitted by mistake may be amended so as to supply the omission: *Cartwright v. Chabert*, 3 Tex. 261, 49 Am. Dec. 742, and note; *Jump v. Batton*, 35 Mo. 193, 86 Am. Dec. 146. But see *Garland v. Britton*, 12 Ill. 232, 52 Am. Dec. 487.

PROCESS.—A WRIT MADE RETURNABLE out of term is voidable only: *Milburn v. State*, 11 Mo. 188, 47 Am. Dec. 148. See *Kelly v. Gilman*, 29 N. H. 385, 61 Am. Dec. 648.

PINKSTON v. HARRELL.

[106 GEORGIA, 102.]

JUDICIAL SALES—CAVEAT EMPTOR.—A purchaser at a judicial sale is bound to comply with his bid, even though he gets no title to the property offered for sale.

JUDICIAL SALES—EFFECT OF—CAVEAT EMPTOR.—A purchaser at a judicial sale must comply with his bid, whether the property offered for sale belongs to the defendant in execution or not, and if the sale is regular and the amount bid equals or exceeds the amount due on the execution, it satisfies the judgment and the plaintiff in execution is precluded by an entry of sale by the sheriff on the execution from showing that there has been, in fact, no sale.

JUDICIAL SALES—COMPELLING COMPLIANCE WITH BID.—A purchaser at a judicial sale is bound to comply with his bid, and, upon his refusal, the sheriff may, by proper proceeding by the defendant in execution, be compelled to enter the amount of such bid as a credit upon the execution.

EXECUTIONS—EXCESSIVE LEVY—REMEDY.—An affidavit of illegality is not a remedy for an excessive levy.

Hickey & Fort, for the plaintiff.

W. C. Worrill, for the defendants.

¹⁰² COBB, J. Pinkston brought his petition against Guilford, sheriff, Harrell, former sheriff, and C. G. Mercer, alleging that J. W. Mercer had obtained a judgment against him for

four ¹⁰³ hundred dollars, principal, with interest from February 21, 1890, at seven per cent per annum, and that the execution issued on such judgment was controlled by C. G. Mercer; that Harrell, as sheriff, had levied such execution upon an undivided one-half interest in lot of land 128 in the eighth district of Quitman county, and that the same was sold to C. G. Mercer for the sum of three hundred and seventy-two dollars, which amount should have been entered as a credit upon the execution, but was not, the sheriff refusing to make the entry. Petitioner had paid upon the execution after the levy and before the sale two hundred and sixty-eight dollars, which, together with the amount bid at the sale, was more than sufficient to satisfy the execution; and the sheriff refuses to turn over to him the excess in his hands. Guilford, as sheriff, had levied the same execution upon the whole of lot 128 in the twenty-first district of Quitman county, and as soon as petitioner was apprised of this he placed an affidavit of illegality in the hands of the sheriff, in which it was alleged that the fieri facias was proceeding illegally, for the following reasons: 1. That the amounts paid before the sale, added to the amount bid at the sale, were sufficient to pay off the fieri facias before the second levy was made; 2. Because the levy is excessive. The sheriff disregarded the affidavit of illegality and sold the land to C. G. Mercer for fifty dollars, which was a grossly inadequate price, the land being well improved and worth at least one thousand dollars. The lots described in the two levies are the same. After the first sale petitioner paid to C. G. Mercer sums aggregating seventy-eight dollars and seventy-nine cents, which should be paid back, as at the time of their payment the execution was fully paid off. Petitioner has been compelled, by the wrongful conduct of defendants, to employ counsel at an expense of one hundred and fifty dollars. Waiving discovery, he prays that the sheriff be enjoined from giving Mercer a deed or from putting him in possession under and by virtue of the second sale, and that Mercer be enjoined from entering into possession or exercising any right of possession thereunder; that the second sale be declared void, and any deed made thereunder be canceled and set aside; and that Harrell, former sheriff, be required to turn over to petitioner the amounts realized from the first sale in excess of the amount due on the execution; and for general relief. By amendment the petitioner ¹⁰⁴ struck from the petition the name of Harrell as a party, and all allegations as to damage by him, and the

prayer for relief as against him; and further amended the petition by substituting two hundred and seventy-six dollars for three hundred and seventy-two dollars as the amount for which the property was sold at the first sale, and by striking all allegations of indebtedness on the part of C. G. Mercer to the plaintiff. The execution under which the levies were had is attached to the petition as an exhibit, and upon it is an entry of the sheriff that the undivided half-interest in lot No. 128 in the eighth district was levied on as the property of the defendant in *feri facias*. The petition as amended was dismissed on a general demurrer filed by the defendants, and to this the petitioner excepted.

1. The petition alleges that a sale was had pursuant to the first levy, and the demurrer admits that this is true. The execution attached to the petition as an exhibit contains an entry of the sheriff showing that the property was levied on as the property of the petitioner, who was the defendant in execution. The petition further alleges that the plaintiff in execution bid in the property at that sale at an amount which, together with certain credits on the execution, was sufficient to satisfy it. It further appears that the plaintiff in execution repudiated his bid, and that the sheriff acquiesced in such repudiation and refused to enter as a credit on the execution the amount bid by the plaintiff. That a purchaser at a judicial sale is bound to comply with his bid, even though he gets no title to the property offered for sale, is the well-settled law of this state. In the case of *McWhorter v. Bearers*, 8 Ga. 300, it was held that: "Where property of a defendant in execution is seized and sold by the sheriff, and there is no warranty of title on the part of the defendants in execution, or the sheriff, the maxim of *caveat emptor* applies to the purchaser of property at sheriff's sale; and the purchaser at sheriff's sale cannot maintain an action against the defendant in execution, for so much money paid to his use, on failure of such title to the property so purchased": See, also, *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Methvin v. Bexly*, 18 Ga. 551. In the case of *Crafton v. Toombs*, 58 Ga. 343, it was held that in the distribution of a fund realized from the sale of property which was levied on as the property of the defendant ¹⁰⁵ in *feri facias*, the fund would be awarded to the oldest judgment against him, notwithstanding he had no title to the property sold. In *Colbert v. Moore*, 64 Ga. 502, it was ruled that: "A purchaser of property at administrator's sale cannot repudiate his bid be-

cause of a defective title, or no title at all in the intestate, when there is no fraud or misrepresentation by the administrator." In the case of *Jinks v. American Mtg. Co.*, 102 Ga. 694, it was held that: "Where an execution is levied upon the property of the defendant, and at a sale had in pursuance of the levy the property brings a sum equal to, or greater than, the amount due upon the execution, such sale satisfies the judgment; and the process is thenceforth functus officio, whether marked 'satisfied' or not." It was further ruled that: "An entry by the sheriff upon such execution, stating the facts above indicated, so long as it stands unchallenged upon the record, is presumptively correct; and in the trial of an issue formed upon an affidavit of illegality alleging payment, which was filed to arrest a subsequent levy of the same execution, such entry concludes the plaintiff." Three things are settled by the decisions cited above: 1. That a purchaser at a judicial sale must comply with his bid, whether the property offered for sale is the property of the defendant in execution or not; 2. That a sale regularly had pursuant to law, if the amount bid equals or exceeds the amounts due on the execution, satisfies the judgment against the defendant in execution; and 3. That the plaintiff in execution is precluded, by an entry of sale by the sheriff on the execution, from showing that there had been in fact no sale. In the present case, the execution shows that there was a levy, and the petition alleges that there was a sale pursuant to that levy. A petition showing these facts is good against a general demurrer. The plaintiff in execution, who was alleged to be the purchaser at the sale, can defend by showing either that there was no sale, or a state of facts which would, either legally or equitably, preclude the defendant in *feri facias* from claiming any benefit under the alleged sale. Should he fail to make any proper defense, the court should decree that he comply with his bid, and that the sheriff enter the amount of the same as a credit upon the execution. If it appears that ¹⁰⁶ the bid was of a sufficient amount to pay off the execution, then it would be satisfied. If the amount of the bid was greater than the sum due on the execution, the purchaser should be required to pay over to the sheriff for the use of the defendant in execution the balance remaining after the execution is satisfied. The petition in the present case set forth a cause of action, and should not have been dismissed on demurrer.

2. It is settled law of this state that an affidavit of illegality,

is not a remedy for an excessive levy: *Manry v. Shepperd*, 57 Ga. 68; *Rogers v. Felker*, 77 Ga. 46.

Judgment reversed.

All the justices concurring, except Lumpkin, P. J., and Little, J., absent.

JUDICIAL SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies to one who purchases real estate at a judicial sale thereof: *Pope v. Benster*, 42 Neb. 304, 47 Am. St. Rep. 703, and note; *Butler v. Fitzgerald*, 43 Neb. 192, 47 Am. St. Rep. 741, and note. But purchasers at a judicial sale are not bound by the rule of caveat emptor if they are misled by representations of the officer making the sale as to the state of the title or encumbrances: *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167, and note.

JUDICIAL SALES.—A PURCHASER at a judicial sale is charged with notice of the condition of the title and of the appraisal: *Nye etc. Co. v. Fahrenholz*, 49 Neb. 276, 59 Am. St. Rep. 540.

JUDICIAL SALES, HOW ENFORCED.—If a judicial sale is reported to, and confirmed by, the court, the purchaser may be compelled to comply with its terms, and the order of the court for such compliance may be enforced by attachment and commitment, after an order of the court made directing a resale, with a provision that the purchaser shall be held responsible in case it brings less than his bid: *Stout v. Philippi Mfg. etc. Co.*, 41 W. Va. 339, 56 Am. St. Rep. 848.

CENTRAL OF GEORGIA RAILWAY COMPANY v. PRICE.

[106 GEORGIA, 176.]

AGENCY—POWER OF AGENT TO APPOINT SUBAGENT. A conductor on a passenger train of a railway company is its agent, and it is bound by all his acts within the scope of his employment; but he has no authority, without express power conferred by the company, to appoint a subagent.

NEGLIGENCE—PASSENGER DETAINED BY, AND INJURED AT HOTEL—LIABILITY OF CARRIER.—If, through the negligence of a railroad conductor, a passenger has been carried beyond his destination, such conductor cannot, without express authority, constitute the proprietor of a hotel unconnected with the railway company its agent to care for such passenger until he can return on the company's train to his destination, and the company cannot be held liable for injury sustained by such passenger at the hotel in consequence of the negligence of the hotel proprietor. In such a case, the negligence of the railway company is the remote, and not the proximate, cause of the injury.

W. D. Kiddoo, for the plaintiff in error.

M. F. Hatcher and Guerry & Hall, for the defendant in error.

177 SIMMONS, C. J. In the view we take of this case, it is unnecessary to deal with the many special grounds of the motion for a new trial. The record discloses that Mrs. Price was a passenger on a train of the defendant company, and that

her destination was Winchester, Georgia. Through the negligence of the conductor, she was not put off at Winchester, but was carried on to Montezuma. Upon her arrival at the latter place, the conductor advised her to go to the hotel and spend the night, he agreeing to carry her back to Winchester in the morning when his train made the return trip. He accompanied her to a hotel where a room was assigned her, the conductor agreeing with the proprietor to pay her expenses. She was taken to her room by the proprietor or his servants, and furnished with a kerosene lamp which she left burning after she had retired to bed. Sometime during the night the lamp, she claims, exploded and set fire to a mosquito net which covered the bed, and in her efforts to extinguish the flames her hands were badly burned. She sued the railway company for damages, and, under the charge of the court, the jury returned a verdict in her favor for four hundred dollars. A motion for a new trial was made, and was overruled by the trial judge. To this the company excepted. The contention of the plaintiff in the court below was, that when the conductor carried her to the hotel in Montezuma and asked her to remain there until his return the next morning, he thereby made the proprietor of the hotel the agent of the railway company, and that if the plaintiff was injured by the negligence of the proprietor or his servants in furnishing her a defective lamp, the railway company was liable, the contract of carriage not having been fully executed and the plaintiff being still a passenger. The trial judge in his charge took this view of the law and in substance so instructed the jury. We, however, think this was error. A conductor on a passenger train of a railway company is the agent of the company, and the company is bound by all of his acts within the scope of his employment. His business is to superintend the running of the train, look after the comfort and safety of the passengers, and do such other work, in and about the running of the train, as is imposed upon him by the rules of the ¹⁷⁸ company or by law. Being only an agent, he had no authority, without express power conferred by the company, to appoint a subagent. He could not delegate to another, an agent of his own appointment, the powers conferred upon him: Civ. Code, sec. 2999. It was not within the scope of his business to constitute the proprietor of a hotel the agent of the company for the purpose of taking care of the plaintiff during the night. We are aware that several of the courts have held that where a passenger is injured by the negligence

of a railway company, such company is liable for the compensation of a surgeon employed by the conductor or station agent for attendance upon the injured passenger. These rulings are put upon the ground of humanity and public policy in case of such emergency; but, so far as we can ascertain, no court has ever held that the company would be liable to the injured passenger for the negligence or malpractice of a surgeon so employed.

It is argued that, whether or not the proprietor of the hotel was the agent of the company, the contract of carriage was not completed, and it was the duty of the company, by its agents, safely to care for the passenger until they had delivered her at her destination. Admitting, for the sake of the argument, that this is true, we still think that the company would not be liable for the consequences of the landlord's negligence. The negligence of the company consisted in passing the station where the passenger desired to alight, without giving her an opportunity to get off. Taking her version of the manner in which she was injured, the injury was occasioned by the negligence of the proprietor of the hotel or his servants in giving her a defective lamp. The negligence of the company in passing her station was, therefore, not the natural and proximate cause of her injury. There was the interposition of a separate, independent agency, the negligence of the proprietor of the hotel, over whom, as we have shown, the railway company neither had nor exercised any control: Civ. Code, secs. 3912, 3913; *Perry v. Central R. R. Co.*, 66 Ga. 746; *Mayor etc. of Macon v. Dykes*, 103 Ga. 847; *South-Side etc. Co. v. Trich*, 117 Pa. St. 390, 2 Am. St. Rep. 672; *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306, 55 Am. St. Rep. 728; *Lewis v. Flint etc. Ry. Co.*, 54 Mich. 55, 52 Am. Rep. 790; *Hoag v. Lake Shore etc. Ry. Co.*, ¹⁷⁹ 85 Pa. St. 293, 27 Am. Rep. 653; *Sira v. Wabash R. R. Co.*, 115 Mo. 127, 37 Am. St. Rep. 386; *Gulf etc. Ry. Co. v. Shields*, 9 Tex. Civ. App. 652; *Smith v. Bolles*, 132 U. S. 125. The injuries to the plaintiff were not the natural and proximate consequences of carrying her beyond her station, but were unusual and could not have been foreseen or provided against by the highest practicable care. The plaintiff was not entitled to recover for such injuries, and the court erred in overruling the motion for new trial.

Judgment reversed.

All the justices concurring.

AGENCY—SUBAGENT.—As a general rule, an agent has no right to delegate his authority to a subagent without the consent of his principal: *Davis v. King*, 66 Conn. 465, 50 Am. St. Rep. 104, and extended note thereto. When an agent may appoint a subagent, see *Appleton Bank v. McGilvray*, 4 Gray, 518, 64 Am. Dec. 92; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280. The general officers of a railroad company have power to contract for the services of a surgeon for railroad employes injured in the course of their employment: *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172.

NEGLIGENCE—CARRYING PASSENGER BEYOND DESTINATION.—A railroad company may be held liable for damages caused by carrying a passenger beyond his destination: *Alabama etc. R. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17.

BRUNSWICK GROCERY COMPANY v. BRUNSWICK & WESTERN RAILROAD COMPANY.

[106 GEORGIA, 270.]

ACTIONS—DISMISSAL AFTER VERDICT.—Plaintiff in a civil action has no right to dismiss the case after the jury have arrived at a verdict against him and are about to return it into court, and after plaintiff and his counsel have been made aware of the result of the trial.

WAREHOUSEMEN—FAILURE TO DELIVER—BURDEN OF PROOF.—A failure on the part of a warehouseman to deliver goods on demand raises a presumption of liability for negligence, and the burden of proof is upon him to account for the nondelivery; but when he makes such an accounting the onus of proof shifts, and the presumption is raised that the loss thus accounted for is not the result of the warehouseman's negligence.

WAREHOUSEMEN—LIABILITY FOR LOSS CAUSED BY INDEPENDENT CONTRACTOR.—A warehouseman is not liable for the loss of goods caused by fire resulting from the negligence of his employe, who, as an independent contractor, is exercising an independent business not subject to the immediate direction and control of such employer.

NEW TRIAL—ERROR IN CHARGE of the court as to the burden of proof is not cause for a new trial, when another trial could not legally result in a different verdict.

Crovatt & Whitfield, for the plaintiff.

Goodyear & Kay, for the defendant.

270 LEWIS, J. The Brunswick Grocery Company sued the Brunswick and Western Railroad Company for the value of certain salt stored by the plaintiff with the defendant as a warehouseman. The defense relied upon was, that the salt was destroyed by fire **271** without negligence upon the part of the defendant. On the trial of the case, the defendant admitted the contract set out in plaintiff's petition, admitted the value of the salt to be four hundred and ninety-six dollars and

sixteen cents, and that the plaintiff had such ownership in the salt as would give it a right of action. The plaintiff showed that on April 2, 1896, the salt was in the possession of the railroad company; that since that date, and before bringing the suit, plaintiff made demand on the defendant for the salt, and it was not delivered. The reply which the plaintiff's agent received to his demand was that the salt was destroyed by fire. The defendant introduced testimony substantially to the following effect: A fire on April 2, 1896, destroyed almost the entire railroad property of the company at the wharf, and all the salt in question was consumed by the fire. The fire was not started by the consent, knowledge, or procurement of any employé of the company. There were quite a number of railroad tracks upon the wharves. Cars were being moved by engines backward and forward daily upon that wharf. At the time of the fire a portion of the wharf was being rebuilt. There was a portable pile-driving engine used in this work. There was some evidence that the wind was blowing from the direction of the engine to the warehouse, and that the smoke-stack of the engine had on it no spark-arrester. The warehouse containing the salt was the one first found on fire. Brown, the contractor, who had charge of the pile-driving engine, and who had control of the entire machinery used in repairing the wharf, was employed by the agent of the defendant to do this work. Brown had previously done other work of the kind for the defendant. His time was not confined to the company's work. He did such other work as he wished to, and had a perfect right to take other work. Neither defendant nor its agents had any control whatever over Brown's hands, nor any control over his machinery. The work of repairing the wharves was given to Brown, who employed, paid, and superintended his own hands, and furnished his own machinery; the company, upon completion of the work, simply settling with Brown at the contract price. It was customary to use such an engine in this kind of work, and witness never knew before of any fire being communicated to the wharf by the engine.

²⁷² It appears from the record that the judge, at the conclusion of his charge to the jury, being about to take a recess until the next day, instructed the jury that if they should agree upon a verdict during the recess, the foreman should retain it, and the jury might then disperse until court convened. The court then, upon request of counsel for both parties, gave permission to counsel to ascertain from the jury their finding

when made. During the recess counsel for plaintiff ascertained that the verdict was in favor of the defendant, and, when the judge, upon the convening of court next day, was about to receive the verdict of the jury, counsel for plaintiff moved to dismiss the case. The court, upon objection of counsel for defendant, overruled the motion to dismiss, and ordered that the verdict be entered of record, which was done. To the overruling of the motion to dismiss the case, counsel for movant excepted. The jury returned a verdict for the defendant, and error is assigned by plaintiff's counsel on the judgment of the court overruling his motion for a new trial.

1. Section 5044 of the Civil Code allows the plaintiff in any action to dismiss his case, either in vacation or in term time. Under the decisions of this court the plaintiff has this privilege at any time, even after the commencement of the trial, provided it is exercised before the rendition or publication of a verdict. Manifestly, there is no right on his part to dismiss the case after a formal return by the jury of their verdict into court, and after counsel has thus been made aware of the result of the trial. In this case permission was given by the court for the jury to disperse after they had found their verdict, and they were also authorized to make known their finding to the counsel who represented the contending parties. It was ascertained by counsel for plaintiff during the recess of the court what the verdict was. So far as the right of plaintiff to dismiss its action was concerned, we think the ascertainment of the verdict in this way was tantamount to its publication. In the language of Bleckley, Judge, in *Meador v. Dollar Sav. Bank*, 56 Ga. 609: "The plaintiff had lost his wager, and it was too late for him to withdraw the stake." In *Peebles v. Root*, 48 Ga. 592, it was decided that the plaintiff may dismiss his case at any time before the ²⁷³ verdict is published, if unknown to him. Warner, chief justice, delivering the opinion in that case, says: "If it had been shown to the court by competent evidence that the plaintiff had surreptitiously, or otherwise, ascertained that the jury had found a verdict against him before the motion was made to dismiss the case, and the court had then refused to dismiss it on that account, we should not have been disposed to interfere with that judgment, but nothing of that kind was made to appear to the court in this case." Such a state of facts was made clearly to appear in the present case, and we think the court was right in overruling the motion to dismiss.

2, 3. There were various grounds in the motion for a new trial, based upon alleged errors in different portions of the court's charge on the subject of the burden of proof in this case. As we construe the charge as a whole, its effect was to instruct the jury that if the proof showed goods were intrusted to a warehouseman by the owner, and the warehouseman failed to deliver the same on demand, this raised a presumption of negligence against the defendant; but that if the defendant accounted for the same by showing they were destroyed by fire not caused by the defendant or its agents, this removed the presumption, and the burden of proof was then upon the plaintiff to show that the loss was due to the negligence of the defendant before there could be a recovery. The Civil Code, section 2930, declares, "a failure to deliver the goods on demand makes it incumbent on him [the warehouseman] to show the exercise of ordinary diligence." There is quite a conflict of authority upon this subject, but we think the weight of it will sustain the charge of the court as above interpreted. For authorities in point see 28 Am. & Eng. Ency. of Law, 648-650; Hale on Bailments and Carriers, 240 et seq.; Schmidt v. Blood, 24 Am. Dec. 149-155; Abbott's Trial Evidence, 562, and numerous authorities cited in above works. On the same line with the weight of authority above cited seems to be the ruling of this court in Cunningham v. Franklin, 48 Ga. 531. We hardly think the section of the code above cited changes the common-law rule upon the subject. The authorities seem to be uniform to the effect that where there is failure on the part of the warehouseman to deliver ²⁷⁴ goods on demand, there is a presumption of liability, and the burden is on him of accounting for the goods; but it does not follow from this that the burden necessarily remains on him throughout the case, for he may account for the goods by showing their loss in such a way, by burglary or an accidental fire, for instance, as will shift the onus, and will raise the presumption that the loss thus accounted for was not the result of the warehouseman's negligence.

But we do not deem it necessary to pass directly upon this question in the decision of this case. Even if the onus probandi was upon the defendant to the fullest extent claimed by the plaintiff in error, we think it was successfully carried by the uncontradicted testimony in the case. The theory of plaintiff's counsel evidently was that the fire was communicated to the warehouse from the engine that was being operated by the con-

tractor Brown, and was the result of negligence in not having the engine provided with a spark-arrester, or with some contrivance to prevent the spread of fire, and that, this contractor being the employé of the defendant company, this negligence was attributable to the company. There was no question, under the testimony, that the party engaged in the operation of this engine was an independent contractor, and was not subject to any direction and control in the management of his machinery and in the operation of his business by the railroad company. The Civil Code, section 3818, declares: "The employer generally is not responsible for torts committed by his employé when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer." The work and business of the employer in this particular case did not fall within any of the provisions of section 3819 of the Civil Code. The work was not wrongful in itself, nor was it a nuisance. From previous experience and knowledge of the defendant's agents the work was not in its nature dangerous to others. The act which the contractor was doing was in violation of no duty imposed by contract with the employer, nor in violation of any duty imposed by the statute; and the employer did not retain the right to control the time and manner of executing the work, or interfere and assume control so as to create the relation ²⁷⁵ of master and servant; nor did the employer ratify the wrong of the independent contractor. Where none of these things exist, it manifestly follows from the statutes above cited that there can be no liability on the part of the employer. In *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231, it was decided that a railroad company is not liable for an injury caused by the negligence of an independent contractor in constructing its railroad, where it retains no control over the contractor except to see, by its superintendent, that the railroad is built according to the contract. To the same effect see *Fulton Co. etc. R. R. Co. v. McConnell*, 87 Ga. 756; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269. Even if there was any error in the charge of the court on the subject of the burden of proof, such error is not cause for a new trial, when another trial could not legally result in a different verdict.

Judgment affirmed.

All the justices concurring.

ACTIONS—DISCONTINUANCE.—Where proof has been taken in an equity case, the plaintiff cannot discontinue the suit with the right of bringing it anew, otherwise than by obtaining an order of the court that the bill be dismissed without prejudice: *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441. See *McLeod v. Bertschy*, 33 Wis. 176, 14 Am. Rep. 755, and note.

WAREHOUSEMAN—NEGLIGENCE—BURDEN OF PROOF.—When a bailor proves the delivery of goods to a warehouseman for storage under a contract of hire, and a failure to redeliver on demand, he makes a prima facie case of negligence, but when the warehouseman has proved that the goods were lost by the act of God, the burden shifts to the bailor to establish that the loss or damage was due to the want of ordinary diligence and care in taking care of the goods: *American Brewing Assn. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538, and note; see the monographic note to *Schmidt v. Blood*, 24 Am. Dec. 153.

NEW TRIAL.—AN INSTRUCTION, though erroneous, will not require the granting of a new trial, if it appears from the evidence that no other verdict could have been properly returned by the jury under instructions entirely correct: *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259.

CALHOUN v. LITTLE.

[106 GEORGIA, 336.]

CONSTITUTIONAL LAW—VOID ORDINANCE.—If a statute provides that the punishment for a violation of a town ordinance shall consist of a fine, or, in default of the payment thereof, certain imprisonment, a town ordinance which allows imprisonment for a violation thereof, without first giving the person convicted an opportunity to pay a fine, is void.

JUDGES—EXEMPTION FROM LIABILITY.—Judges of inferior courts, as well as judges of courts of superior and general jurisdiction, are exempt from liability in damages for judicial acts, even when such acts are in excess of their jurisdiction.

JUDGES—EXEMPTION FROM LIABILITY.—A judge of an inferior court which has jurisdiction of the person and jurisdiction to try and punish the accused for the offense with which he is charged is not liable in damages for exceeding his authority in fixing and inflicting punishment under an ordinance subsequently declared void.

CODES—CONSTRUCTION OF SECTIONS.—If a section of the code of a state has been codified from a decision of its supreme court, such section must be construed in the light of the source from which it was taken, unless the language imperatively demands a different construction.

Hitch & Myers, for the plaintiff.

L. A. Wilson, for the defendant.

³³⁶ COBB, J. On June 26, 1896, Little, as mayor pro tem. of the town of Waresboro, tried Calhoun upon the charge of violating the following ordinance of the town: "It shall be unlawful for any person or persons to engage in fighting or riot-

ous conduct within the corporate limits of the town of Waresboro, ³³⁷ or resist or obstruct the marshal or any policeman while in the discharge of their official duties." The accused was convicted, and the following sentence was passed upon him: "After hearing the evidence in the above-stated case, it is ordered and adjudged by the court that the defendant be kept in the jail of the town of Waresboro for three days." It appears from the minutes of the town council that this sentence was afterward commuted by the officer who tried the accused to imprisonment for one day. This sentence was passed pursuant to the following ordinance: "Any person who shall commit any or either of the offenses hereinbefore mentioned . . . shall, on conviction for each offense, be sentenced to pay a fine of not less than one dollar, nor exceeding twenty dollars, or imprisonment and work on the public streets not exceeding thirty days." The ordinances herein quoted were passed in 1888. The present suit is an effort on the part of Calhoun to recover damages from Little on account of the alleged illegal detention of the plaintiff in the town jail. The petition alleges that the sentence above quoted was without authority of law, and that the imprisonment of petitioner thereunder was malicious and in violation of law; that petitioner had violated no ordinance of the town, and that the conviction and sentence was a willful and malicious persecution. The petition further alleges that efforts were made on the part of friends of petitioner to give bond or deposit any sum of money required to enable him to have the sentence reviewed and set aside, but that these efforts were unavailing. The defendant answered, denying that the sentence and imprisonment thereunder were malicious or without authority of law, and averring that his acts were in furtherance of law and order. The allegations in the petition as to efforts to give bond in order to have the sentence reviewed are also denied. At the trial the evidence showed that the defendant was regularly elected a member of the town council on June 22, 1896. From an extract of the minutes of the council it appears that the defendant was elected mayor pro tem. on July 6, 1896; but there was testimony showing that he was mayor pro tem. at the date of the trial of the plaintiff for the alleged violation of the ordinance of the town. The defendant testified that ³³⁸ no bond was ever offered him either by Calhoun or by anyone in his behalf. The jury returned a verdict for the defendant; and, plaintiff's motion for a new trial being overruled, he excepted.

1. Were the ordinances under which the plaintiff in error was convicted and sentenced to imprisonment by the defendant valid at the time of the trial? These ordinances were passed under authority of a charter granted to the town by the superior court, the provisions of which charter will be found in sections 685-710 of the Political Code. An examination of these provisions will show that the ordinances were valid at the time of their passage. In 1891 an act was passed prohibiting the general assembly from granting charters to towns of less than two thousand inhabitants, and conferring upon the superior courts exclusive power to grant such charters: Acts 1890-91, p. 190. This act was repealed on December 1, 1893; Acts 1893, p. 65. In the case of Fullington v. Williams, 98 Ga. 807, this act was held to be constitutional and valid. On December 9, 1893, a new charter was granted the town of Waresboro by the general assembly: Acts 1893, p. 335. This act has never been repealed either expressly or by implication, nor has its validity been in any way impaired. From it, therefore, the town of Waresboro must derive whatever authority it has to exercise corporate functions. This act repeals all former charters granted to the town, but provides that all ordinances then in force and not inconsistent with its provisions shall be valid and of force until amended or repealed by the mayor and aldermen of the town. An examination of the act will show that the ordinance which defined the offense for which Calhoun was tried is perfectly consistent with its provisions. Is the ordinance which prescribes the punishment to be inflicted upon persons convicted of offenses against the town also consistent with the provisions of the act? Section 11 of the act is as follows: "Be it further enacted, that the mayor or mayor pro tem. of said town shall hold a police court in said town at any time for the trial and punishment of all violators of their ordinances, by-laws, rules, and regulations of said town, the punishment inflicted not to exceed a fine of one hundred dollars, or, in default of the payment of said fine and costs, by labor ³³⁹ on the streets of said town or public works of said town not to exceed sixty days, or confinement in the common jail of the said town not to exceed sixty days." It needs no argument to show that an ordinance of the town which allows imprisonment without first giving the person convicted an opportunity to pay a fine is rendered void by this section of the act.

2. The question therefore arises: Is the defendant liable to

the plaintiff in damages for inflicting a punishment upon him under a void ordinance? The court over which the defendant presided had jurisdiction of the person of the plaintiff and jurisdiction to try and punish him for the offense with which he was charged. The defendant has only exceeded his authority in fixing the punishment. It is universally conceded that judges of courts of superior and general jurisdiction are exempt from liability in damages for judicial acts, even when such acts are in excess of their jurisdiction. This doctrine has become firmly fixed in the jurisprudence of both England and the United States. Upon its strict application depends, to a very great extent, the usefulness of courts and the fearless and impartial administration of justice: See Broom's Commentaries, 103-106; 7 Am. & Eng. Ency. of Law, 668; Pratt v. Gardner, 2 Cush. 63, 48 Am. Dec. 652; 2 Hilliard on Torts, 161; Cooley on Torts, 472 et seq.; Bishop on Noncontract Law, sec. 781; Randall v. Brigham, 7 Wall. 523; Bradley v. Fisher, 13 Wall. 335. But it is said that the law affords no protection to presiding officers of inferior courts when they exceed their jurisdiction: Piper v. Pearson, 2 Gray, 120, 61 Am. Dec. 438; Vanderpool v. State, 34 Ark. 174; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; 7 Am. & Eng. Ency. of Law, 669. Judge Cooley, after stating that there is a distinction as to liability for judicial acts between judges of courts of general and those of limited jurisdiction, gives as the reasons for this distinction the following: "The inferior judicial officer is not excused for exceeding his jurisdiction, because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject ³⁴⁰ to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty by doing so. Moreover, in doing so he keeps within the presumption of law, for these are always against the rightfulness of any authority in an inferior court, which, under the law, appears doubtful": Cooley on Torts, 491. We are unable to appreciate the force of the reasons embodied in the above quotation, which contains all the arguments we have been able to find in favor of the dis-

distinction. On the other hand, we quite agree with the supreme court of Iowa, when it says in *Thompson v. Jackson*, 93 Iowa, 876, that: "After an exhaustive examination of the cases which make this distinction, we have to say that we do not think they are founded upon grounds which can be sustained by any logical or reasonable argument." In the case just referred to it was held that: "A justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith believing he had jurisdiction." Mr. Bishop, in his work on *Noncontract Law*, section 783, commenting upon this distinction, says: "But, in reason, if judges properly expected to be most learned can plead official exemption for their blunderings in the law, a fortiori those from whom less is to be expected, and who receive less pay, should not be compelled to respond in damages to their mistakes, honestly made after due carefulness." And this, we think, is a complete answer to all of the reasons given why such distinction exists. In *Bell v. McKinney*, 63 Miss. 187, it was held that where a magistrate had authority to require a person brought before him to give bond to appear at the circuit court, but, under an erroneous judgment as to the extent of his authority, and in good faith, tried such person, and, upon his conviction, sentenced him to pay a fine or be imprisoned, the magistrate was not liable in damages to the person aggrieved. In the case of *Henke v. McCord*, 55 Iowa, 378, the facts were almost identical with those in the present case. It was there held that: "A justice of the peace who enforces an ordinance which ³⁴¹ is void for want of power in the city to enact it cannot be held liable therefor in a civil action." The distinction between the liability of presiding officers of inferior and those of superior courts is mentioned, but it was not necessary to decide whether or not the distinction was rational. We have seen, however, that this same court in a more recent case declared in very vigorous terms that the distinction was utterly illogical. In *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, it was held that a justice of the peace who, in the exercise of his honest judgment, holds an unconstitutional ordinance constitutional, is not liable for such an error of judgment. In the opinion Grant, J., uses this language: "These inferior tribunals should be left to the exercise of their honest judgment, and, when they have so exercised it, they are exempt from civil liability for errors." In *Clark v. Holdridge*, 58 Barb. 61, 40 How. Pr. 320, it was

held that a justice of the peace who inflicted a larger fine than the law required would be protected by the principle of judicial irresponsibility: See, also, *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Scott v. Fishblate*, 117 N. C. 265; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Austin v. Vrooman*, 128 N. Y. 229. These decisions settle, we think, beyond doubt, that no good reason exists in law why presiding officers of inferior courts should not be measured by the same rules with respect to liability for their judicial acts, as judges of courts of general jurisdiction.

We must not be understood, however, as ruling that these officers have immunity from civil liability in all cases. As was said in *Bradley v. Fisher*, 13 Wall. 335, 352: "Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." But all judicial officers stand on the same footing, and must be governed by the same rules. It follows from what has been said that, where the court has jurisdiction of the subject matter of the offense, and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages. But where there is a clear absence of jurisdiction over the subject ³⁴² matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him. There is nothing in section 3852 of the Civil Code to conflict with the ruling made in the present case. That section is as follows: "If the imprisonment is by virtue of a warrant, neither the party bona fide suing out, nor the officer who in good faith executes the same, is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction. In such cases, the good faith must be determined from the circumstances of each case. The same is true of the judicial officer issuing the warrant; the presumption being always against him as to good faith, when he has no jurisdiction." The section seems to provide that a judicial officer who in bad faith issues either a defective or a void warrant will be liable in an action for false imprisonment at the instance of the person imprisoned thereunder. It is, however, limited by its very terms not only to an act done out of court, but one which, though to some extent judicial, is largely ministerial in its nature; and in no event can it have any application to the acts

of a judicial officer while presiding in court and as a court is passing upon a question involving the jurisdiction of his court, and which he is bound to decide. In the present case, the court over which the defendant in error presided had jurisdiction of the subject matter of the offense, and of the person of the plaintiff in error. The sentence was passed pursuant to a void ordinance, it is true, but on the defendant in error in the first instance was cast the duty of determining whether or not this ordinance was valid. Acting in a judicial capacity, he in effect decided that the ordinance was valid. True, the question was not directly made before him, but he necessarily held it to be valid, because this was the only source from which he could derive his authority. To hold that he was liable in a civil action for damages for erroneously deciding that this ordinance was valid would be, in effect, to hold that the law makes it the duty of an officer to decide a question, and then punishes him for not deciding it correctly. The law never does this. The presiding officer of a court clothed with authority to decide questions of law which may come before it will be protected in ³⁴³ the exercise of this authority, however erroneous this decision might be. It is far better for a few innocent persons to suffer than for the ends of justice to be thus hampered.

3. It is contended, however, by counsel for the plaintiff in error, that section 752 of the Political Code makes a different rule applicable to the defendant in error. That section is as follows: "Members of the council and other officers of a municipal corporation are personally liable to one who sustains special damages as the result of any official acts of such officer, if done oppressively, maliciously, corruptly, or without authority of law." By reference to the margin of the page on which this section appears it will be seen that it is codified from a decision of this court. Unless the language of the section imperatively requires a different construction, it will be presumed that the general assembly in adopting it intended merely to adopt the principle of law announced in the decision from which it is taken: See in this connection Sutherland on Statutory Construction, sec. 300. The decision from which the section is codified is *Pruden v. Love*, 67 Ga. 190. In that case it appears that the town council, at a meeting appointed for that purpose, and of which the plaintiff (*Love*) had no notice, condemned as a nuisance the house of the plaintiff, and had it torn down without giving him a hearing. The court held that

for this act the members of the town council were personally liable in damages to the owner of the building. Chief Justice Jackson in the opinion says: "Whilst, therefore, we hold with the judge below, that the mayor and council could not be held personally liable, unless they acted either maliciously, corruptly, oppressively, or without authority of law, yet we agree with him, too, in the opinion evinced by his denial of a new trial, that there is sufficient evidence to uphold a verdict that they did act without complying substantially with the law in a most essential element of a fair trial—notice of time and place—and thereby acted so as to oppress the defendant in error." The mayor and council in that case were not a court, and were not held liable because, when sitting as a court, they made an erroneous decision. The section of the code, it will be noticed, uses the expression "official acts," and can have no application ³⁴⁴ to a member of a town council when presiding as a judge over the police court of the town.

4. It is not necessary to express any opinion as to whether or not the defendant in error would have been liable for a refusal to accept a valid bond tendered by the plaintiff in error for the purpose of having the decision reviewed, as the evidence on this point was conflicting, and no ruling of the trial judge on this point was excepted to. Under the views above expressed, if any errors were committed by the presiding judge in charging the jury, such errors were immaterial.

Judgment affirmed.

All the justices concurring, except Little, J., who was disqualified.

MUNICIPAL CORPORATIONS—VOID ORDINANCE.—A city ordinance, fixing a less penalty for an offense than that fixed by statute for the same offense is void: *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361.

JUDGES—EXEMPTION FROM LIABILITY.—Where a judge of a court of limited or inferior jurisdiction secures jurisdiction of a person or cause, but in the progress of his investigation or proceeding decides that he has greater powers than he actually possessed, and, therefore, pronounces a judgment or sentence in excess of his powers and void, he is not personally answerable to a person subjected to imprisonment under such judgment or imprisonment: *Robertson v. Parker*, 99 Wis. 652, 67 Am. St. Rep. 889, and note. See the extended notes to *McCall v. Cohen*, 42 Am. Rep. 648; *Yates v. Lansing*, 6 Am. Dec. 303.

IN CONSTRUING STATUTES, courts, in order to ascertain the intention of the legislature, will judicially notice such contemporaneous history as led to, and probably induced the passage of the

laws: *Connecticut etc. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655. In adopting a statute from another state there is always adopted the construction already placed upon it by the courts of that state: *Ives v. McNicoll*, 59 Ohio St. 402, 69 Am. St. Rep. 780.

CARTER v. STATE.

[106 GEORGIA, 372.]

ARSON—INDICTMENT—SUFFICIENCY.—An indictment for arson, charging the burning of an "outhouse," need not allege whether such outhouse was located in a city, town, or village.

ARSON—"HOUSE"—WHAT IS.—The body of a freight-car, taken off the wheels and supported upon permanent posts attached to the ground and used as a freight warehouse, is a "house" within the meaning of a statute defining arson.

ARSON—OUTHOUSE—WHAT IS.—The word "outhouse," as used in a statute defining arson, and as applied to a structure not located within a city, town, or village, is intended to embrace a house of any description which is not a dwelling-house. Hence, it embraces a "freight warehouse."

NEW TRIAL—REFUSAL TO GIVE REQUESTED INSTRUCTIONS.—A refusal to give a requested charge to the jury so fully covered by general instructions already given that the jury could not be mistaken as to the law on the point in question, is not error nor cause for a new trial.

CRIMINAL LAW—ACTS OF ACCOMPLICES—ADMISSIBILITY.—The acts and conduct of one accomplice, during the pendency of the criminal act, not alone in its actual perpetration, but also in its subsequent concealment, are admissible in evidence against another accomplice.

NEW TRIAL CANNOT BE GRANTED on the ground that the trial judge refused to inquire whether any of the jurors were disqualified by reason of relationship, when it is not shown that any disqualified juror was placed upon the panel.

NEW TRIAL—COMPETENCY OF JUROR—DISCRETION OF COURT.—The fact that the trial judge held, upon conflicting testimony, which would warrant a finding either way, that a certain juror was competent to try the accused is not an abuse of discretion, nor ground for a new trial.

T. E. Watson, Brantley & Bennet, and E. D. Graham, for the plaintiff in error.

J. W. Bennett, solicitor general, Goodyear & Kay, and D. M. Clark, for the state.

373 LUMPKIN, P. J. Upon an indictment against H. B. Carter, D. H. Moody, F. Herrington, and Jim Moody, charging them with the crime of arson, Carter was separately tried and convicted. His bill of exceptions alleges error in overruling a demurrer to the indictment, and in refusing to sustain a motion for a new trial. We will undertake a brief discussion of the material questions thus presented.

1. The indictment charged the willful and malicious burning of "a certain freight warehouse," the property of the Southern Railway Company, "the same being then and there an outhouse." The point made by the demurrer was that the indictment failed to allege whether or not the house alleged to have been burned was in a city, town, or village. The decision of this court in *Smith v. State*, 64 Ga. 605, practically settles ³⁷⁴ this question. It was there held that "whether the outhouse burnt be in a city, town, or village, or not, does not affect the legal character of the offense. It affects the punishment only." Accordingly, a ruling of the trial court refusing to exclude testimony on the ground that the indictment failed to allege that the outhouse was not in a city, town, or village, was sustained.

2. The next question for determination is whether or not the structure burned was a "house" within the meaning of section 136 of the Penal Code, defining the offense of arson. The evidence shows that the body of a freight-car had been taken off the wheels and placed near the railway track at a station; that it was supported upon permanent posts, and that a platform, to be used in transferring freights to and from the car body, had been attached to the same. It further appeared that the structure thus located was used as "a freight warehouse" by the railway company in precisely the same manner as if it had been an ordinary warehouse built for this identical purpose. In view of these facts, we have no difficulty in holding that the structure in question was a "house," and, accordingly, we approve the instruction to this effect given by the trial judge to the jury. That the structure with which we are now dealing was not in shape like an ordinary house, or that a portion of the same had been formerly used as a movable car, does not prevent it from being, within legal contemplation, a house. It was certainly no longer a car; and, having all the elements of permanency, and being adapted to the uses for which a warehouse is suitable, we see no reason why it should not be treated as a structure coming within the protection of the statute above cited. See, in this connection, *Williams v. State*, 105 Ga. 814, 70 Am. St. Rep. 82.

3. As will have been observed, the indictment alleged that this structure was an "outhouse." There was no evidence showing that the Southern Railway Company had or owned any other building at this station; and counsel for the accused thereupon insisted that the house in question could not, in

legal contemplation, be an "outhouse," and, accordingly, that there was a fatal variance between the allegations of the indictment and the proof. It is true that the word "outhouse" primarily means a building adjacent to a dwelling-house and subservient ³⁷⁵ thereto, but distinct from the mansion itself: See 2 Bouvier's Law Dictionary, 341; Black's Law Dictionary, 859; Anderson's Law Dictionary, 515. After careful consideration, however, we have reached the conclusion that the word "outhouse," as used in sections 136, 141, and 142 of our Penal Code, as applied to a structure not located within a city, town, or village, is intended to embrace a house of any description which is not a dwelling-house. In *Watt v. State*, 61 Ga. 66, this court held that the willful and malicious burning of a country church was indictable under section 4379 of the then existing code, which is the same as section 141 of the present Penal Code. The status of a railway warehouse, located elsewhere than in a city, town, or village, cannot be legally different from that of a country church similarly situated. That all houses, other than dwelling-houses, thus located were intended to be regarded as "outhouses," seems manifest from the provisions of section 142 of the Penal Code, which declares that "setting fire to an outhouse of another, as described in the preceding section, shall be punished," et cetera; for, unless this meaning be given to the word "outhouse" as used in section 142, we would have no penalty whatever for the offense of setting fire to a house of the kind described in the present indictment. The truth is, the prefix "out" was totally unnecessary in this connection, except for the exclusive purpose of distinguishing dwelling-houses from other houses; but the use thereof should not, we think, be given the effect of defeating the legislative will, which clearly was to include buildings other than those which would ordinarily be understood as falling within the class designated by the word "outhouse."

4. All of the persons named in the indictment were accused as principals. The court was requested to charge that if Carter, who was then on trial, was guilty either as an accessory before the fact, or as an accessory after the fact, he could not lawfully be convicted under this indictment. The court refused to instruct the jury in the precise language of the requests presented, but did charge the jury repeatedly, distinctly, and unequivocally, that the accused could not be convicted, unless they were satisfied beyond a reasonable doubt that he was present ³⁷⁶ at the time the arson was committed

and actually participated in its perpetration. A mind of even ordinary comprehension could not have failed to understand, from the plain and explicit language used by the judge, that no verdict of guilty could properly be returned against the accused unless the evidence showed his guilt as a principal. The jury must have known, from the instructions given them, that no matter how intimate a connection with the crime Carter may have had, either before or after its commission, he could not be lawfully convicted of the charge brought against him, unless he was present and actually participated in the burning of the house. This being so, and the evidence tending to show his guilt as a principal being very strong, we do not feel constrained to order a new trial because of the court's refusal to give the requests above mentioned, although we do not hesitate to say it would have been the better practice so to do.

5. The court admitted, over objection of the accused, evidence of certain acts on the part of D. H. Moody and declarations immediately accompanying the same, and also a letter written by him to Herrington, all tending to show a guilty connection on Moody's part with the crime charged in the indictment, and also, to some extent, implicating Carter as a participant therein. These acts were done and these declarations were made some time after the arson had been committed, and the letter was written at a still later period; but there was, independently of the conduct and sayings of Moody, with which we are now dealing, and of anything contained in his letter to Herrington, much evidence tending to show there was a conspiracy to steal goods from the warehouse and burn the building, and also to establish the state's contention that Carter was actively concerned, not only in the theft and arson, but also in a common intent and purpose on the part of the conspirators to effectuate a concealment of these crimes and shield each other from detection and punishment. In other words, there was, outside of the evidence objected to, proof authorizing the conclusion that the alleged conspiracy embraced a "criminal enterprise," the scope of which included larceny, arson, and concealment. There was also some evidence warranting the inference ³⁷⁷ that this enterprise was still pending on the occasions to which the evidence complained of as illegal related. It seems, therefore, under the decision of this court in *Byrd v. State*, 68 Ga. 661, that this evidence was admissible against Carter. In that case it was distinctly ruled that the acts and conduct of one accomplice during the pend-

ency of the wrongful act, not alone in its actual perpetration, but also in its subsequent concealment, were admissible against another accomplice. This holding was doubtless based upon the idea that the criminal enterprise was still pending while the conspirators continued to be active in taking measures to prevent the discovery of the crime or the identity of those connected with its perpetration.

6. One ground of the motion for a new trial complains that the judge erred in refusing to inquire whether or not any of the panel of jurors put upon the accused were stockholders in the Southern Railway Company, or were related to such stockholders. As it was not made to appear that any juror having such a disqualification was in fact upon the panel, this ground is obviously without merit.

7. The only remaining ground of the motion for a new trial which need be noticed is one alleging partiality on the part of a juror. This ground was supported by evidence going to show that prior to the trial the juror in question had used expressions indicating prejudice against the accused. By way of counter-showing, however, the juror made an affidavit positively denying the use of the language imputed to him, and was in this respect corroborated by other evidence. It therefore simply appears that, upon a conflict of testimony which would have warranted a finding either way, the judge held that the juror was not incompetent to try the accused, and certainly there was no abuse of discretion in so doing.

Judgment affirmed.

All the justices concurring.

ARSON—INDICTMENT.—The locus in quo of a house burned is sufficiently alleged where it is set forth as "a certain house, then and there owned by him, the said" defendant, the words "then and there" referring to a time and county previously stated: *Baker v. State*, 25 Tex. App. 1, 8 Am. St. Rep. 427, and note.

NEW TRIAL—DISQUALIFICATION OF JUROR.—A person accused of crime is not entitled to a new trial, on the ground that a juror had formed and expressed an opinion before he was selected, if he was accepted as such juror without examination by the accused: *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20.

Arson—House, What Is.

The word "house," as used in statutes defining arson, does not necessarily imply a dwelling-house as required at common law to constitute a crime by the willful burning thereof, but may mean any erection of value, falling within the general description of a house: *Pike v. State*, 8 Lea, 577-578. When such statutes define

the crime of arson to be the willful burning of any house, the word "house" means any building or structure inclosed with walls, and covered, whatever may be the materials used in the building: *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435. Within the meaning of the statutes under discussion, the words "house" or "building" are synonymous: *State v. Moore*, 61 Mo. 276. And any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings, is a building within the meaning of a statute defining arson, and providing for its punishment. "It is not necessary that the 'house, edifice, structure, vessel, or other erection,' should have been intended for, or have been used as a habitation, but it is sufficient if it be capable of affording shelter for human beings": *People v. Fisher*, 51 Cal. 319.

A structure, fitted up as a school and engine-house, is a "building," the willful burning of which is arson: *Commonwealth v. Horgan*, 2 Allen, 159. A schoolhouse is a "house," and may be the subject of arson under the statute: *Wallace v. Young*, 5 T. B. Mon. 155. A barrel-house attached to a cooperage establishment is a "house," for the burning of which a person may be convicted of arson: *Pike v. State*, 8 Lea, 577. A warehouse is a "house," and evidence that a building was occupied by the owner only for the storage of such tools and stock as he used in his private business, supports an indictment for arson describing the building as a warehouse: *Commonwealth v. Uhrig*, 167 Mass. 420. A storehouse may be the subject of arson: *Hall v. State*, 3 Lea, 552. And a jail has been held to be an inhabited dwelling-house, within the statutes against arson: *Smith v. State*, 23 Tex. App. 357, 59 Am. Rep. 773; *Lockett v. State*, 63 Ala. 5; *People v. Cotteral*, 18 Johns. 115; *Commonwealth v. Posey*, 4 Call, 109, 2 Am. Dec. 560.

The term "building," as used in the statutes, does not necessarily import a structure so far advanced as to be in every respect finished and perfect for the purpose for which it is designed eventually to be used, and whether the structure has arrived at such a stage of completion as to constitute it a building is a question for the jury to determine: *Commonwealth v. Squire*, 1 Met. 258. But in *McGary v. People*, 45 N. Y. 155, it was decided by a divided court that if the whole frame of the structure fired, designed for a factory, was not up at the time, that the part which had been erected was not entirely inclosed, that the floors were not laid, that the stairs were not up, and that no part of the building was ready for occupation or substantially ready for the reception of the machinery designed for the factory, there was no building erected within the meaning of the statute, and that it was not arson to maliciously burn it. It was also decided in *State v. McGowan*, 20 Conn. 245, 52 Am. Dec. 336, that the willful burning of an unfinished house, which was never occupied, and not appurtenant to another house, is not arson, as where such house had not been painted, or the glass in one of the doors inserted at the time of the fire.

A sawmill is not necessarily a building, and an indictment for

arson in burning a sawmill must specifically allege that it is a building, or it is fatally defective: *State v. Livermore*, 44 N. H. 386. A demolished building is not a "house" so as to be the subject of arson, within a statute which defines a house as any building or structure inclosed with walls and covered: *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435.

The statutes defining arson embrace a great variety of subjects, differently described and classified. Among the subjects falling within the general classification of "buildings" or "houses," or "outhouses," are stables: *Dugle v. State*, 100 Ind. 259; barns: *State v. Thornton*, 56 Vt. 35; *Gibson v. State*, 54 Md. 447; *State v. Roberts*, 15 Or. 187; *Wolf v. Commonwealth*, 30 Gratt. 833; *Staeger v. Commonwealth*, 103 Pa. St. 469; *Sampson v. Commonwealth*, 5 Watts & S. 385; *Emig v. Daum*, 1 Ind. App. 146; *State v. Cherry*, 63 N. C. 493; and corn cribs: *Brown v. State*, 52 Ala. 345; *Adams v. State*, 62 Ala. 177; *Cook v. State*, 83 Ala. 62, 3 Am. St. Rep. 688; *Leonard v. State*, 96 Ala. 108; *Hester v. State*, 17 Ga. 130; *State v. Millican*, 15 La. Ann. 557. A cotton-house or structure used for the storing of cotton is a "house," within the meaning of the Alabama statute: *Hendersen v. State*, 105 Ala. 82; *Washington v. State*, 68 Ala. 85. The burning of a county courthouse is arson, within the meaning of a statute making it criminal to willfully burn a "dwelling-house or other building": *Lavelle v. State*, 136 Ind. 233; *Gregg v. State*, 3 W. Va. 705. Jails and penitentiaries have often been held to be houses within the meaning of the statutes against arson: *State v. Johnson*, 93 Mo. 73; *Commonwealth v. Posey*, 4 Call, 109, 2 Am. Dec. 560; *Stevens v. Commonwealth*, 4 Leigh, 683; *Lockett v. State*, 63 Ala. 5; *Willis v. State*, 32 Tex. Crim. Rep. 534. A jail has been held to be a dwelling-house: *People v. Van Blarcum*, 2 Johns. 105; and, also, an inhabited building: *State v. Collins*, 2 Idaho, 1182.

One who willfully burns a schoolhouse is guilty of arson. Such property is embraced within the words "any other outhouse," or "any other house": *Jones v. Hungerford*, 4 Gill. & J. 402; *Wallace v. Young*, 5 T. B. Mon. 155; *Commonwealth v. Horrigan*, 2 Allen, 159. And a church is a house within the meaning of the phrase, "any other house": *Watt v. State*, 61 Ga. 66; *McDonald v. Commonwealth*, 86 Ky. 10; *State v. Kingsbury*, 58 Me. 238; *State v. Roe*, 12 Vt. 93. A millhouse is a "house" or "building": *State v. Gregory*, 33 La. Ann. 737; but a sawmill is not necessarily a building: *State v. Livermore*, 44 N. H. 386. A building used for the purpose of selling or manufacturing goods is a house, and may be the subject of arson: *State v. Morgan*, 98 N. C. 641; and the same rule applies to a storehouse or building used for a store: *People v. Shainwold*, 51 Cal. 468; *State v. Biles*, 6 Wash. 186; *State v. Sandy*, 3 Ired. 570; *Hall v. State*, 3 Lea, 552. A building used exclusively for storing goods is a warehouse, and a "house," within the meaning of the statute against arson, although such building had been constructed, and formerly used for another purpose, and though the goods therein were owned by a tenant: *Allen v. State*, 10 Ohio St. 287. A barrel-

house attached to a cooperage is included under the general term "house," as used in the statute: *Pike v. State*, 8 Lea, 577; and so is a sugar-house: *State v. Ambler*, 56 Vt. 672.

HARDIN v. STATE.

[106 GEORGIA, 384.]

CRIMINAL LAW—INDICTMENT—SUFFICIENCY.—An entire omission from an indictment of the following words embodied in the form prescribed by statute for such instruments, namely, "contrary to the laws of said state, the good order, peace and dignity thereof," is a material defect, which may be taken advantage of by special demurrer before trial. Such statutory words are mandatory and not merely declaratory.

J. S. Turner, for the plaintiff in error.

H. G. Lewis, solicitor general, for the state.

384 LEWIS, J. This case came on for trial in the county court of Putnam county, on an indictment found by the grand jury of that county, charging the accused with unlawfully selling spirituous liquors. There was an entire omission from the indictment of the following words embodied in the form prescribed by the statute for such instruments, namely, "contrary to the laws of said state, the good order, peace, and dignity thereof." Before arraignment and plea, the accused demurred to the indictment, "because the same does not follow the form prescribed by the statute, and does not allege that the acts therein charged were 'contrary to the laws of said state, the good order, peace, and dignity thereof,' as required by the statute, and hence is fatally defective and void." The judge of the county court overruled the demurrer; whereupon the accused petitioned the superior court, praying for a writ of certiorari, alleging error in the judgment of the court overruling his demurrer. The judge of the superior court passed an order refusing to sanction this petition, which order is assigned as error in the bill of exceptions.

There can be no question that the legislature of this state has power to prescribe a particular form for an indictment by a grand jury. It can dispense with all forms and provide new ones. It can declare that no particular form is essential to the validity of such instruments, or it can imperatively require that they shall contain certain words and allegations. The simple 385 question, then, in this case is whether or not, there being no constitutional provision bearing upon the sub-

ject, the legislature of the state has, by a mandatory provision, specifically prescribed that every indictment shall contain the language referred to in the demurrer and entirely omitted from the indictment against the accused. We think the question is answered in the affirmative by the language used in section 929 of the Penal Code, which declares that: "The form of every indictment or accusation shall be as follows." Then follows the form prescribed, concluding with the language, "contrary to the laws of said state, the good order, peace, and dignity thereof." It is true this same section of the code provides that: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of this code, or so plainly that the nature of the offense charged may be easily understood by the jury." But it is manifest that this portion of the section does not in anywise refer to the form of the indictment prescribed by the statute. It has reference to the offense itself, and to the terms and language used in describing the criminal act. It has reference to that portion of the indictment designated by parentheses in the form embodied in this section; that is, "where the offense is to be stated, and the time and place of committing the same, with sufficient certainty." The law says simply that this statement shall be sufficiently technical and correct when the offense is charged in the terms and language of the code, or so plainly that the nature of the offense charged may be easily understood by the jury. In *Horne v. State*, 37 Ga. 80, 92 Am. Dec. 49, it was decided that "an indictment should be 'in the name and behalf of the citizens of Georgia'; if these words be omitted, on exception taken at the proper time, the indictment will be quashed; such exception is not good in arrest of judgment." In that case, the words quoted in the decision are as much a formal part of the instrument as the words omitted from the indictment in this case. The statute is no more mandatory in requiring that an indictment shall proceed "in the name and behalf of the citizens of Georgia" than it is in demanding that the criminal acts shall be charged as "contrary to the laws of ³⁹⁶ said state, the good order, peace, and dignity thereof." If, therefore, a demurrer is good on account of the omission of a certain portion of the form prescribed for the commencement of an indictment, we cannot see why it would not be equally good on account of leaving out the words prescribed for its conclusion. In the case of *Camp v. State*, 25 Ga. 689, it was held that "an indict-

ment concludes properly, if it follows the form prescribed by the statute." See, also, *Crabb v. State*, 88 Ga. 584-588, in which Justice Lumpkin stated in his opinion that it is not necessary that the indictment should specify any particular act upon which it is founded, but, if it charges the criminal act was "contrary to the laws of said state, the good order, peace, and dignity thereof," it is in this respect sufficient.

We do not think the case of *Loyd v. State*, 45 Ga. 57, in conflict with our decision in this case. It appeared in that case that there were two counts in the indictment. The first count began and concluded in the form required by the statute. The second count, while it concluded with "contrary to the laws of said state," et cetera, omitted the words, "And the jurors aforesaid, in the name and behalf of the citizens of Georgia." These words omitted from that count, however, appeared in the first count of the indictment. It is true the statute requires that where there is more than one count, each additional count shall commence with the words quoted. The words prescribed by the form, having been used at the commencement of the indictment, might be construed as qualifying all the counts that followed. This was simply a decision by two judges of this court that the form of an indictment, as prescribed by the law, need not be followed to the letter. It is sufficient if it conform in all material particulars. The writer is inclined to doubt the correctness of that decision. It seems to be against the decided weight of authority. In *State v. Wagner*, 118 Mo. 626, a similar defect in one count in an indictment was held to be fatal. The old rule was adhered to in that case, that "every separate count should charge the defendant as if he had committed a distinct offense," and in the opinion of Sherwood, J., quite an array of authorities is cited in support of the decision. The difference, however, between the case of ³⁸⁷ *Loyd v. State*, 45 Ga. 57, and the one we are now considering, is, that the portion of the form omitted from this indictment was not only not followed in letter, but was entirely omitted, and not followed either in spirit or substance, or by other words substantially meaning the same thing. In entire accord with the decision in this case is the opinion of Warner, J., in *Bulloch v. State*, 10 Ga. 61-63, 54 Am. Dec. 369. When we consider, however, the history of technical pleading in criminal procedure, we think the question is easily solved, and that our conclusion in this case is beyond doubt correct. One special feature in an indictment recognized at common law was that it

should conclude with words indicating that the acts committed were an offense against the peace and dignity of the sovereign power in whose name the accusation proceeded. In England, the usual words were, "against the peace of our lord the king [or lady the queen], his crown and dignity." In this country the words are simply changed to conform to the proper designation of the sovereign power, and are generally such words as are used in the statute of our state, "contrary to the laws of the state, the good order, peace, and dignity thereof." As far as our investigation has gone, which has been quite extensive, the authorities seem to be absolutely uniform, that when the rule in relation to this particular form in an indictment is expressly provided for by the written law of a state, it must be strictly applied, and the omission of the words thus formally prescribed, either by the constitution or statute of a state, is fatal: 2 Hale's Pleas of the Crown, 187 et seq.; 1 Bishop's New Criminal Procedure, secs. 648, 651, 652; 10 Am. & Eng. Ency. of Law, 513; 10 Ency. of Pl. & Pr. 441, 442; State v. Nunn, 29 La. Ann. 589; State v. Pemberton, 30 Mo. 376; State v. Sims, 43 Tex. 521; Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293; Williams v. State, 27 Wis. 402; Rice v. State, 3 Heisk. 215; Holden v. State, 1 Tex. App. 225; Anderson v. State, 5 Ark. 444; State v. Joyner, 81 N. C. 534; State v. Dycer, 85 Md. 246; Wright v. State, 37 Tex. Crim. Rep. 3.

Some of the authorities above cited have gone to the extent of declaring that such a defect in an indictment is fatal, whether especially excepted to or not. Such is the ruling in the case ³⁸⁸ of Holden v. State, 1 Tex. App. 225, above cited. This, however, is not the rule of pleading in Georgia. Section 955 of our Penal Code provides that exceptions merely to the form of an indictment shall be made before trial. Others have gone to the extent of holding that the smallest and most immaterial variation from the words prescribed would be fatally defective. In the case of Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293, the supreme court of that state ruled that where the constitution required the indictment to conclude, "against the peace and dignity of the state of West Virginia," the conclusion, "against the peace and dignity of the state of W. Virginia," was not sufficient, and was fatally defective. The question made by this record, however, does not require a decision on the point as to whether any variation in the words prescribed in the form would necessarily be fatal. It may be that a substantial compliance with the form by the use of

terms varying a little from those prescribed, but meaning identically the same thing, would be sufficient. It is contended by state's counsel that the accused in this case being charged with "unlawfully" selling liquors, this substantially complies with that part of the form prescribing the words, "contrary to the laws of said state," et cetera. To this it might be answered that there may be an unlawful sale of liquors against the revenue laws of the United States, without a violation of the laws of this state regulating the sale of such an article. But in any event there is nothing in the indictment that can possibly be urged as a compliance with the remaining portion of the form prescribed for the conclusion of this instrument, to wit, contrary to "the good order, peace, and dignity thereof." From the authorities cited, it will be seen that in many of the states the terms, "contrary to the statutes or laws of the state," are not adhered to in the prescribed forms; but it seems that words charging the criminal acts as an offense against the dignity of the sovereign in whose name the indictment is found are uniformly adhered to, unless dispensed with by statute. It is true, where no form is prescribed by the organic law of the state, its legislature can by statute provide that no indictment or accusation by a grand jury shall be deemed insufficient by reason of any defect or imperfection in ³⁸⁹ matter of form, not tending to the prejudice of the defendant. This was done by the act of Congress embodied in section 1025 of the Revised Statutes of the United States; and it was accordingly ruled, in the case of *Frisbie v. United States*, 157 U. S. 160, 161, that by virtue of this provision in the Revised Statutes the omission to charge that the offense was "contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States" was immaterial. While in most of the cases cited above the rulings were based upon mandatory provisions of the state constitutions providing the specific words to be used in an indictment, it can make no difference whether the mandate is in the constitution or the statute law; for, of course, a constitutional statute is as binding upon the court as any provision in the constitution itself. In *Anderson v. State*, 5 Ark. 444, it was decided that the form adopted by the constitution is merely declaratory, and in affirmance of an old principle, not the creation of a new one. Sebastian, J., delivering the opinion of the court in that case, says: "This form derives no new consideration from its being found in the constitution; such

would have been the rule by the law without its insertion there. It was only declaratory and in affirmance of an old principle, and not a creation of a new one. Its end and office here is the same as in England, whence the form was borrowed. It is used merely as an accomplishment in the form of pleading to indicate clearly the sovereign power offended in the violation of law." In *State v. Joyner*, 81 N. C. 534, it was decided that an indictment, whether for a common-law or a statutory offense, which does not conclude "against the peace and dignity of the state," is fatally defective. It appears in that case that while at one time, under the constitution of North Carolina, it was required that indictments should conclude "against the peace and dignity of the state," yet, under the constitution of force when that decision was rendered (see page 538 of opinion delivered by Smith, C. J.), this clause was left out of the organic law of the state, and that there was really no written law on the subject in that state. Notwithstanding that fact the court held that the omission of the words was a material and fatal defect.

³⁹⁰ It would seem, therefore, from the trend of authority upon the subject, that even where there is no provision in the organic or statute law of the state in reference to the matter, the courts are bound by the doctrine of the common law, that an indictment which does not conclude with words either substantially or literally that the crime charged is "contrary to the laws of the state, the good order, peace, and dignity thereof," is no indictment at all. In 10 *Encyclopedia of Pleading and Practice*, 441, it is declared: "It is an old rule in the law of criminal procedure that an indictment must conclude against the peace and dignity of the government whose laws have been violated, and the requirement of this conclusion, in words appropriate to our form of government, has at various times been incorporated into the organic law of many of the United States. It is also sometimes expressly provided for by statute. The rule, when established by the written law, is strictly applied, and the omission thus formally to conclude an indictment is fatal, except when the necessity is obviated by statutes not inconsistent with the organic law." This text is supported by a number of decisions cited in the notes. But, instead of there being any statute in Georgia which obviates the necessity of such words, we have, on the contrary, a provision mandatory by its terms, recognizing the doctrine of the old common law on the subject, and substantially engrafting

its provisions in our statute. It is no answer to these views that this particular form of an indictment is purely technical, and cannot possibly affect any substantial rights of the accused; that its omission from the indictment cannot possibly work any prejudice or injury to the accused. The law-making power has a right to define what an indictment is, and prescribe such a form for it as would distinguish it from other ordinary complaints in court. When it does so prescribe in plain terms, and an instrument is presented by the grand jury of a county which does not undertake either in substance or form to comply with the requirements of the law, it is no indictment, and it is the duty of the court to so hold when the question is made in the proper time and manner, as was done in this case. As Chief Justice Bleckley said, in *Lampkin v. State*, 87 Ga. 524: "If he insists upon it, he has ³⁹¹ a right to be tried upon an indictment good in form as well as in substance." Our system of pleading, as a rule, wisely has more regard to the substance than it has to the form of what is alleged; but, notwithstanding the many changes which have been made in old usages pertaining to judicial procedure, this particular form of indictment now under consideration, which grew up with the common law of England, has not only not been dispensed with by our written laws, but by a positive statute has been engrafted on our system of criminal pleading; and, therefore, it still exists in this state as an ancient landmark that has survived the pruning and culture of modern legislation.

We think, therefore, the demurrer to the indictment in this case should have been sustained, and the indictment quashed; and that the judge below erred in refusing to sanction the petition for certiorari.

Judgment reversed.

All the justices concurring.

AN INDICTMENT WHICH CONCLUDES, "against the peace and dignity of our said state," instead of "the peace and dignity of the state," as required by the constitution, is not such a substantial variance as to vitiate the same: *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162. But see *Haun v. State*, 13 Tex. Ct. App. 383, 44 Am. Rep. 706. An indictment concluding, "against the peace and dignity of the statute," is invalid, the constitution requiring the conclusion, "against the peace and dignity of the state," although no exception was taken below: *Cox v. State*, 8 Tex. Ct. App. 254, 34 Am. Rep. 746.

EVANS v. STATE.

[106 GEORGIA, 519.]

EVIDENCE—SELF-INCRIMINATING — ADMISSIBILITY.

Evidence that an accused person, not under arrest, was compelled, against his consent, to put his hand in his pocket and surrender a pistol, is not admissible on his trial for the offense of carrying a concealed weapon, when the constitution of the state provides "that no person shall be compelled to give testimony tending in any manner to criminate himself."

EVIDENCE—SELF-INCRIMINATING — ADMISSIBILITY.

Evidence of guilt found upon a person under legal arrest may be used in evidence against him, but if a person not in legal custody is compelled to furnish incriminating evidence against himself, such evidence is not admissible under a constitutional provision that "no person shall be compelled to give testimony tending in any manner to criminate himself."

H. H. Dean, for the plaintiff in error.

H. Thompson, solicitor general, for the state.

519 COBB, J. Evans was convicted of the offense of carrying a concealed weapon. His motion for a new trial was overruled, and he excepted. The only witness introduced on the trial of the case was Brown, a policeman, who testified that he was called up at night in Gainesville, Hall county, on account of **520** some disturbance. When he got to the place where the disturbance was alleged to have occurred he saw nobody, but was told that the accused had been shooting around there. After a while he saw the accused coming down the road. At this point the witness was allowed to testify as follows: "I told him to give up his pistol, and he said: 'What pistol?' and I said, 'The one you have been shooting with.' He refused to give it to up, but I called Mr. Lyles, another policeman, and we forced him to give it up. He had it in his hand under his coat, and it was concealed so I could not see it, until after I compelled him to give it up." After this, witness arrested the accused. He had no warrant for the accused, and neither had Lyles, the other policeman. That part of the testimony of the witness which is quoted above was objected to by the accused, on the ground that "no party can be compelled to give evidence against himself by act or words." The refusal of the court to exclude this evidence is assigned as error in the motion for a new trial.

The constitution of this state provides that: "No person shall be compelled to give testimony tending in any manner to

criminate himself": Civ. Code, sec. 5703. In the case of *Day v. State*, 63 Ga. 667, it was held that: "Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. A defendant cannot be compelled to criminate himself by acts or words." In that case Allen, a witness for the state, testified that: "Witness took hold of [the accused] and pulled him along, and then he put his foot in the track. The first time witness told him to put his foot in the track defendant refused. Witness then took hold of his foot and put it in the track; he did not consent to it. The shoe fitted the track." This evidence was admitted over the objection of the accused that it was compelling him to furnish evidence against himself, contrary to the constitution of the state. Chief Justice Warner, after quoting the constitutional provision above set out, added: "Nor can one, by force, compel another, against his consent, to put his foot in a shoe track for the purpose of using it as evidence against him on the criminal side of the court, the more especially when the person using such force ⁵²¹ has no lawful warrant or authority for doing so." It will thus be seen that in the case cited the constitutional provision was construed to apply to cases other than those in which the accused was forced to give evidence against himself either in court or pursuant to an order of court. In the present case, neither the officer who testified nor the officer who assisted in the arrest had any warrant for the accused, nor was any arrest made until after the accused was forced to give up his pistol. The only fair interpretation that can be given to the evidence objected to is, that the accused was compelled, against his consent, to put his hand in his pocket and surrender his pistol to the officers, and thus disclose that he was guilty of a violation of law. Viewing the case in this light, we think it is controlled by the decision in the *Day* case, and that the court erred in admitting the evidence objected to. We have made a careful examination of the decisions of this court bearing upon this question, and find none which, properly construed, conflicts with the ruling here made.

The case of *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748, differs from the present case in three important respects: 1. The accused was under legal arrest; 2. He did not object to furnishing the incriminating evidence; and 3. He remained passive while shoes, which were afterward used as evidence of his guilt, were pulled from his feet by others. Chief Justice

Jackson, in his opinion in that case, in distinguishing it from the Day case, makes use of this language: "It was that which he wore which witnessed against him, and not any act he did under coercion, such as being forced to put his feet in tracks somebody had made." While the headnote in the case of Drake v. State, 75 Ga. 413, restricts the application of the constitutional provision above quoted to persons sworn as witnesses in a case, an examination of the facts appearing of record in that case will show that it is really not in conflict with the Day case or the ruling made in the present case. While it appears that part of the clothing introduced in evidence was taken off of the person of the accused, he was at the time in legal custody, and no objection, so far as the record discloses, was made by him. Woolfolk v. State, 81 Ga. 551, is to be distinguished from the Day case for the same ⁵²² reasons as the case last cited. In Myers v. State, 97 Ga. 76, the accused was not forced, against his will, to furnish evidence against himself. In discussing this question Atkinson, justice, recognizes the distinction laid down by Chief Justice Jackson in the Franklin case, supra, in the quotation above set out. Besides, Myers was under arrest, and it does not appear whether the shoes introduced in evidence were taken from his feet, or whether, if this was done, he raised any objection thereto. In the case of Williams v. State, 100 Ga. 511, no such question as the one now under discussion was raised or decided. In that case, an officer took from the person of the accused marked coins which were afterward used in evidence against her. She was not compelled to furnish any evidence whatever against herself. The decision in that case simply holds that the constitutional provision as to unreasonable searches and seizures did not render the evidence inadmissible. It was there said that the purpose of the constitutional provision was to deter the law-making power from authorizing or declaring lawful any unreasonable search or seizure, and to prevent courts and executives from enforcing any law which was violative of this provision; but that it was not intended to operate so as to prevent the courts from receiving evidences of crime, although they might have been obtained by an illegal and unreasonable search and seizure. It would seem from these cases that the law in this state is that evidences of guilt found upon a person under legal arrest may be used in evidence against him; but that, where a person not in legal custody is compelled to furnish incriminating evidence against himself, the evidence is not ad-

missible. The ruling made in the Day case constrains us to reverse the judgment of the court below in refusing a new trial, on the ground that the evidence complained of was improperly admitted.

Judgment reversed.

All the justices concurring.

EVIDENCE ILLEGALLY OBTAINED—UNLAWFUL SEARCH. On a trial for carrying concealed weapons, evidence of the discovery of a pistol found concealed upon the defendant's person by an officer, prior to his arrest, while making a forcible search of his person, is admissible against the defendant, although the search was unauthorized and unlawful. Evidence so obtained does not violate a constitutional guaranty that a person accused shall not be compelled to give evidence against himself: *Shields v. State*, 104 Ala. 35, 53 Am. St. Rep. 17, and note.

SEARCH OF PRISONER.—A person, while in custody on a criminal charge, may be subjected to a personal search and examination against his will, in order to discover upon him evidence of his criminality: *Rusher v. State*, 94 Ga. 363, 47 Am. St. Rep. 175. But an officer has no right, upon suspicion, nor upon information derived from others, to arrest a citizen and search his person to ascertain whether he is carrying a concealed weapon in violation of law: *Pickett v. State*, 99 Ga. 12, 59 Am. St. Rep. 226.

SOUTHERN RAILWAY COMPANY v. NEWTON.

[106 GEORGIA, 566.]

GARNISHMENT—JURISDICTION.—If summons of garnishment is based upon an action in which the court never acquires jurisdiction to render judgment against the principal defendant, payment by the garnishee of the amount of a debt owing by him to such defendant does not relieve the garnishee from liability therefor.

H. M. Dorsey, for the plaintiff in error.

Maddox & Terrell, for the defendant in error.

⁵⁶⁶ FISH, J. This was a suit brought by Newton, in a justice's court, against the Southern Railway Company. It was tried upon ⁵⁶⁷ an agreed statement of facts. The justice rendered a judgment for the plaintiff, and on appeal to a jury in the justice's court there was a verdict for the plaintiff. The defendant carried the case to the superior court by certiorari; and the certiorari being overruled, it excepted. The only point insisted on here by the plaintiff in error is, that it was relieved from liability to Newton by reason of the payment into court of the amount which it owed him under a garnishment issued in the case of *Freeman v. Newton*, as set out in the agreed

statement of facts. We are clearly of opinion that this contention of the plaintiff in error is not sound. Freeman commenced, in the justice's court, an action against Newton, by having a summons issued for the latter, and upon this had summons of garnishment issued against the Southern Railway Company. No service was ever effected upon Newton in that case, and it is not claimed that he ever did anything which amounted to a waiver of service. In fact, it appears that the plaintiff, presumably on account of the want of service upon the defendant, subsequently instituted another action against Newton, upon the same claim, in which the defendant was duly served and in which the plaintiff obtained a judgment against him. After the summons was issued for the defendant in the case from which the garnishment proceedings issued, the jurisdiction of the court was dependent upon service being effected upon him, or a waiver by him of service. As there was no service upon the defendant, or waiver thereof, the court never acquired any jurisdiction in that case: *Ballard v. Bancroft*, 31 Ga. 503; *Branch v. Mechanics' Bank*, 50 Ga. 413; *Ferguson v. New Manchester Mfg. Co.*, 51 Ga. 609; *McLendon v. Hernando Phosphate Co.*, 100 Ga. 219. The garnishment proceedings being ancillary to the main case, the jurisdiction of the court as to them was necessarily dependent upon its jurisdiction in that case. When the action against the principal defendant fell, for the want of service, the ancillary suit against the garnishee went down with it. It is very apparent, therefore, that the garnishee did not relieve itself of liability to Newton, the defendant in the principal case, by paying the amount which it owed him into a court which ⁵⁶⁸ never acquired jurisdiction over him, and consequently had none over the garnishee. The fact that the garnishee, after it had answered, paid into court the amount which it owed Newton, upon the demand of the justice who issued the summons of garnishment, can make no difference. The justice had no authority whatever to make such a demand, and a compliance therewith by the garnishee was, in legal contemplation, merely voluntary. Section 4726 of the Civil Code provides that: "The plaintiff shall not have judgment against the garnishee until he has obtained judgment against the defendant." As we understand from the agreed statement of facts, no judgment was ever rendered against the defendant in the case upon which the garnishment was based, and, if one had been rendered, it would have been void, as in the absence of service upon the defendant the court

had no jurisdiction to give judgment against him. Until a valid judgment has been obtained against the principal defendant, a garnishee is under no legal obligation whatever to pay the amount which he owes the defendant into court. The payment by the railway company of the amount which it owed Newton into the justice's court being without authority of law, it was not relieved of its liability to him; and consequently the verdict of the jury in the justice's court in the present case was right, and there was no error in overruling and dismissing the certiorari.

Judgment affirmed.

All the justices concurring.

GARNISHMENT BASED UPON A JUDGMENT void for want of jurisdiction is ineffective: *Oelbermann v. Ide*, 93 Wis. 669, 57 Am. St. Rep. 947, and note; *Frisk v. Reigelman*, 75 Wis. 499, 17 Am. St. Rep. 198, and note. But a garnishee cannot avail himself of mere irregularities in a suit against his creditor: *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Railway Co. v. Brooks*, 90 Tenn. 161, 25 Am. St. Rep. 673. See the extended note to *Sessions v. Stevens*, 46 Am. Dec. 341-346.

WATERS v. DIXIE LUMBER AND MANUFACTURING Co.

[106 GEORGIA, 592.]

MECHANICS' LIENS — VESTED RIGHT—CHANGE IN STATUTE.—A mechanic's lien fixed and secured under an existing statute becomes a vested right, and no subsequent repeal or modification of such statute can affect such right.

Mayson & Hill, for the plaintiff in error.

J. F. Daniel and Rosser & Carter, for the defendant in error.

592 **LITTLE, J.** The Dixie Lumber & Manufacturing Company, on August 11, 1896, filed its petition against Cochran and Waters, alleging that it had furnished and delivered to Cochran, who had contracted to build a house for Waters, a bill of lumber and other building material to the amount of five hundred and eighty-five dollars and eight cents, which was delivered on the land of Waters and was used in building the house and improving said land, giving the location of it; that the material was furnished August 12, 1895; that it had duly filed and had recorded a materialman's lien on the property; that it had taken no other security for the debt; that within the prescribed time it had served Waters with written notice, as required by the statute, of the claim of lien and filing the

same. It alleges that this suit is brought to enforce such lien within twelve months from the completion of the contract. It prays a general judgment against Cochran for one hundred and forty-one dollars and seventy-nine cents, with interest, and that its lien be set up by judgment against the property improved for the amount allowed by law. To the petition was attached copy of the notice served upon Waters on August 26, 1895. There was also attached copy of the record of the claim of lien filed August 26, 1895, and an itemized bill of the material furnished. By amendment, the ⁵⁹³ plaintiff alleged that the contract price for building the house for Waters by Cochran was eighteen hundred dollars. Defendant Waters excepted to the charge of the court given in the following language: "Now the plaintiff contends, as against Waters, that this material was used in the improvement of the premises described in the declaration, and that the premises were the property of Waters, and that the amount sued for is within the twenty-five per cent which it alleges the owner Waters is liable to pay. If this is true and the plaintiff has established its lien, it would have a right to assert its lien against Waters for the amount sued for." The basis of the exception is, that the law given in charge had been repealed and another remedy enacted, and plaintiff could only enforce his claim according to the remedy allowed by the law at the time of the trial. An exception to another part of the charge was made, based on the same ground. The verdict was against Cochran for one hundred and forty-one dollars and seventy-nine cents, with interest and costs, and that a special lien to this amount should exist on the real estate of Waters.

The single question made by the record is, whether the lien of materialmen must be enforced against the real estate of the owner under the terms of the statute as it existed at the time the lumber and material were furnished, or under the provisions of the amending statute which was in force at the time of the trial. According to the petition, the provisions of the act of 1893 were in force at the time the lumber and material were furnished. This act provides that the lien of materialmen shall attach upon the real estate improved, as against the true owner, for twenty-five per cent of the contract price of the material furnished for the improvement of the real estate: Acts 1893, p. 34. By the provisions of the act approved December 16, 1895, which was amendatory of the act of 1893, the lien should attach upon the real estate as against the owner

to the extent of not more than twenty-five per cent of the contract price agreed to be paid by the owner to the contractor. By the act approved December 18, 1897, which was in force at the time of the trial, it was provided that the lien should not attach for a sum greater than the balance that the owner might be indebted to the person having the contract at the time of the service of the ⁵⁹⁴ notice. The provisions of these various acts being different, the plaintiff in error contends that the statute creating a lien in favor of materialmen is remedial in its nature; that no rights by such statute become vested in the person furnishing the materials for the improvement of real estate, that subsequent statutes changing the lien are operative on liens acquired prior to their passage, and the rights of materialmen are, therefore, to be decided by the provisions of the statute in force at the time of the trial. The question, therefore, to be considered is, whether the provisions which create liens in favor of one who furnishes material for the improvement of real estate are statutes which affect the remedy alone and may therefore be retrospective, or whether they vest rights which cannot be affected by a subsequent change in the statute. The question is one not without difficulty, and we find many adjudicated cases which make contrary rulings. In general terms, the lien of a materialman for furnishing lumber and other articles which enter into the construction of houses or other improvements made upon land, is a claim created by statute for the purpose of securing priority of payment for the price of the material furnished in erecting such houses or in making other improvement on the land. It has been said to be a peculiar, particular, and special remedy given by statute, founded and circumscribed by the terms of its own creation: *Copeland v. Kehoe*, 67 Ala. 594.

Jones, in his work on Liens, volume 1, section 107, citing the case of *Frost v. Ilsley*, 54 Me. 345, says: "A lien created by statute may be taken away or modified by a subsequent statute. . . . The lien is but a means of enforcing the contract, a remedy given by law; and, like all matters pertaining to the remedy and not to the essence of the contract, until perfected by proceedings whereby rights in the property over which the lien is claimed have become vested, it is entirely within the control of the law-making power in whose edict it originated." The author also cites a number of cases to be found in note on page 73, to support the doctrine that the repeal of the statutory lien defeats the lien remedy, although at the time of the

repeal the proceedings prescribed by the statute for enforcing the lien ⁵⁹⁵ had been instituted and were pending in court. The same author, in section 109, concedes that other courts have held that liens which have become fixed under the statutes creating them cannot be taken away by repealing the statutes, and that if the lien arises directly upon the performing of labor, or the doing of any other act, the lien cannot be defeated by subsequent repeal; that if the lien arises upon the taking of some preliminary step to enforce it, then the lien cannot be defeated after such step has been taken: *Wabash etc. Co. v. Beers*, 2 Black, 448; *Streubel v. Milwaukee etc. R. R. Co.*, 12 Wis. 67; *Hallahan v. Herbert*, 11 Abb. Pr., N. S., 326; *Chowning v. Barnett*, 30 Ark. 560. In reference to mechanics' liens, a number of courts of last resort have ruled to the effect that, after a lien has once become fixed and secured, it becomes a vested right, and it is not within the power of the legislature to destroy the right by the repeal of the statute under which it accrued: *In re Hope Min. Co.*, 1 Saw. 710; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Skyrme v. Occidental Mill etc. Co.*, 8 Nev. 219; *Weaver v. Sells*, 10 Kan. 609; *Buser v. Shepard*, 107 Ind. 417; *Willamette Falls etc. Co. v. Riley*, 1 Or. 183; *Streubel v. Milwaukee etc. R. R. Co.*, 12 Wis. 67; *Christman v. Charleville*, 36 Mo. 610. The Texas court of appeals, in the case of *Handel v. Elliott*, 60 Tex. 145, ruled that the lien of a mechanic becomes a part of the obligation of the contract which the legislature cannot impair. And *Wade on Retrospective Law*, section 173, lays down the rule to be, that from the time the material is furnished or labor performed the right to the lien is a part of the obligation of the contract which is protected in the same way that the laws protect corporeal property. Per contra, *Boisot on Mechanics' Liens*, section 33, says that "the better reason and an equal weight of authority sustain the doctrine that the lien pertains merely to the remedy, and may, therefore, be taken away by the legislature that created it." And to support this doctrine he cites *Woodbury v. Grimes*, 1 Colo. 100; *Bangor v. Goding*, 35 Me. 73, 56 Am. Dec. 688; *Frost v. Ilsley*, 54 Me. 345; *Hanes v. Wadey*, 73 Mich. 178; *Bailey v. Mason*, 4 Minn. 546; *Templeton v. Horne*, 82 Ill. 491; *Donaldson v. O'Connor*, 1 E. D. Smith, 695; *Dunwell v. Bidwell*, 8 Minn. 34.

Even if it be held that the lien given to mechanics or materialmen who do the work or furnish the material for the erection of valuable improvements on land is a remedy for the en-

forcement of the contract, we think the better rule for the construction of such a remedy is that laid down by the supreme court of the United States in the case of *Gunn v. Barry*, 15 Wall. 610, as follows: "The legal remedies for the enforcement ~~596~~ of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a state, fall within the category last mentioned, they are to that extent utterly void." Under our code, materialmen have a special lien on the real estate for the material furnished by them which goes into the improvement of such real estate, and the lien attaches upon written notice given to the owner to the amount of the material furnished. Such was the law as it existed at the time the company furnished the material which went into the improvement of the real estate of the plaintiff in error. Can it be said that the consideration of this fact was not within the contemplation of the parties at the time the contract for furnishing the material was made? Can it be inferred that without such right of security, which would attach when the material was furnished and the owner notified, the contract would have been entered into? We think not. In our view, the materialman acquired a substantial right when, under the law in force, he parted with his property and thus aided in the improvement of the real estate of the owner who had contracted to have his property substantially improved and largely increased in value. And as we agree with the ruling made in a large number of the adjudicated cases which considered this subject, we hold that a materialman's lien, as prescribed by the statute, cannot subsequently be repealed or modified so as to change his right of security, when the contract has been performed, the material delivered, and the notice given under the terms of the statute in force at the time of the contract. The verdict in this case is within the terms both of the act of 1893 and that of 1895, *supra*; and whether the presiding judge in his charge referred to the one or the other of these acts, as regulating the right of the defendant in error, is immaterial.

Judgment affirmed.

All the justices concurring.

MECHANICS' LIENS—VESTED RIGHT.—The right to hold a mechanic's lien becomes vested at the time the material is fur-

nished; and, in determining whether or not such right exists, the courts will look only to the statute in force at that time: *Taylor v. Dahu*, 6 Ind. App. 672, 51 Am. St. Rep. 312, and note; *Spangler v. Green*, 21 Colo. 505, 52 Am. St. Rep. 259, and note.

SMITH v. STATE.

[106 GEORGIA, 673.]

HOMICIDE—UNJUSTIFIABLE KILLING.—A mere trespass on real property, accompanied by insulting and abusive words or gestures, is not sufficient provocation for a killing to reduce it from murder to voluntary manslaughter.

CRIMINAL LAW—FLIGHT—PRESUMPTION OF GUILT. Flight or attempted flight of the accused before his arrest is at most only a circumstance to be considered by the jury with the reasons that prompted it, tending to show guilt, or by which an inference of guilt may be raised, and it has no probative force unless it appears that the accused fled to avoid arrest. Flight of the accused by itself does not authorize the jury to presume guilt.

HOMICIDE—JUSTIFIABLE—SELF-DEFENSE.—In cases of mutual combat the slayer is protected only when the killing is done as an absolute necessity to save his own life, and only in cases where it appears that the person killed is the assailant, or that the slayer has in good faith endeavored to decline any further struggle before he inflicts the mortal wound.

HOMICIDE—JUSTIFICATION—SELF-DEFENSE.—It is justifiable homicide for one to kill another who, in company with some person or persons, intends and endeavors, in a riotous and tumultuous manner, to enter his habitation for the purpose of assaulting or offering personal violence to any person therein, and it is not necessary, in order to justify such killing, that such personal violence shall amount to a felony.

J. R. Cooper, O. Brown, and J. A. Perry, for the plaintiff in error.

C. H. Brand, solicitor general, for the state.

676 **LITTLE, J.** The first two grounds of the motion for new trial are based on the allegations that the verdict is contrary to law, and without evidence to support it. Inasmuch as the case goes back for another trial, we do not pass upon the weight of the evidence in the case.

1. The next ground of error assigned is, that the court erred in charging the jury the law in relation to voluntary manslaughter. We are of the opinion that, under the facts in this case, there was no evidence which authorized a charge on the law of voluntary manslaughter. We do not wish to be understood as saying that if the circumstances were different, that is to say, if there was any proof or a legitimate inference from the facts in evidence that the plaintiff in error slew the **677**

deceased as the result of passion founded on sufficient provocation, found in the trespass of the deceased on the property of the accused, the offense of which he would be guilty would not be that of voluntary manslaughter. Every homicide committed as the result of passion is by no means to be classed as voluntary manslaughter. A homicide, when done in the absence of malice, and as the result of a sudden heat of passion, engendered by a provocation sufficient in law to justify the passion, is graded below the crime of murder, because the killing is then partially excused on account of the justly aroused passion; nor is it always necessary, in order to grade the offense as voluntary manslaughter, that there should be an assault upon the person killing, to justify the excitement of passion which induced the homicide: *Golden v. State*, 25 Ga. 532; *Stokes v. State*, 18 Ga. 17. Our Penal Code, section 65, declares that in all cases of voluntary manslaughter there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion. Assuming, as we must under the evidence, that the deceased was a trespasser on the property of the accused at the time of the homicide, under the theory of the state he was a mere trespasser without intending to injure the person or property. Under general criminal law, neither insulting nor abusive words or gestures, nor trespass, nor breach of contract, of themselves amount to sufficient provocation for an act of resentment likely to endanger life. A mere trespass on property, less than that to protect which our code makes it justifiable homicide to kill the trespasser, may be resisted by any reasonable or necessary force short of taking or endangering life: *Clark's Criminal Law*, 145. If, in the course of a struggle to prevent such a trespass by the use of reasonable and necessary force which the owner is entitled to use, a struggle and combat ensue, then, whether the slayer is justified, guilty of murder or voluntary manslaughter, is to be determined by other rules, not necessary here to be discussed. According to the evidence, there was no attempt to remove the trespasser; but the theory of the state is, that the accused, with malice, ⁶⁷⁸ or actuated by the spirit of revenge, deliberately shot the deceased while standing in the yard of the accused, when there was no necessity for him to do so to protect his habitation or family, and no circumstances at the time to justify a passion which caused him to shoot the de-

ceased. The theory of the defendant was, that he shot and killed the deceased to prevent him from entering his house, which he says the deceased was attempting to do, to commit an assault on the person of his wife. The issue is a clearly defined one. If the theory of the defendant be supported by the facts, he was not guilty of any offense, but was entirely justified. If the theory of the state be correct, then the crime was murder. Under the evidence, there seems to have been a deliberate shooting on the part of the defendant, not as the result of passion, not in a struggle, nor was there any mutual combat, nor any evidence of an attempt by the slayer to remove the trespasser from his premises otherwise than by deliberately shooting him down. The evidence in this case is remarkable, not for what the witnesses who went to the house of the accused with the deceased say as to the facts of the homicide, but as to what they do not say; and although three of them were present at the time on the premises of the accused, no clear account is rendered by any of them as to the facts of the homicide. But from the evidence of these witnesses, and circumstances shown by other witnesses, we fail to find any circumstances establishing the proposition that the shooting was the result of passion. This being true, a charge relating to voluntary manslaughter was error. Nor can a conviction for this offense stand, under the evidence disclosed in the record: *Dyal v. State*, 97 Ga. 428.

2. Another ground of the motion for a new trial alleges that the court erred in charging on the subject of flight. The language of the court on this subject is as follows: "Something has been said upon the subject of flight. The rule on that subject is, that where one commits an act that amounts presumptively to a crime, and the party who commits the act immediately flees from the processes and officers of the law, to avoid arrest or trial, the presumption would be authorized that he fled from the consciousness of guilt. That presumption ⁶⁷⁹ can be rebutted by showing that flight was not from a sense or consciousness of guilt, but for other reasons." It may be that the principle stated by the judge in his charge is a correct one; and if the propositions that the accused immediately flees from the processes and officers of the law, and that such flight is for the purpose of avoiding arrest or trial, be assumed, the conclusions which follow are legal and natural. But whether so or not, the charge as to the law of presumptions which apply to the flight of one who is charged with the com-

mission of an offense, or has done an act which may amount to a crime, was too strongly put, and, without qualification, does not correctly lay down the principle applicable under the facts of this case. Mr. Wharton, in his work on Criminal Evidence, section 750, in treating this subject, says: "When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from a consciousness of guilt, and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred." And, further treating the subject, he also says: "The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred; but this should be qualified by a general statement of the counter-vailing considerations incidental to a comprehensive view of the question." Underhill, in his treatise on Criminal Evidence, section 119, citing *State v. Jackson*, 95 Mo. 623, 2 N. Y. Crim. Rep. 450, says: "It cannot with correctness be said that the flight or attempted flight of the accused before his arrest, taken alone, raises any legal presumption of guilt, or that his flight, without regard to the motive which prompted it, is, in law, evidence of guilt. At the most, it is only a circumstance to be considered by the jury with the reasons that prompted it, tending to show guilt, or by which an inference of guilt may be raised, and it has no probative force unless it appears that the accused fled to avoid arrest or imprisonment." In the case of *Hickory v. United States*, 160 U. S. 408, it was ruled that the flight ⁶⁸⁰ of the accused is a presumption of fact, not of law, and is merely a circumstance tending to increase the probability of the defendant's being the guilty person, which is to be weighed by the jury like any other evidentiary circumstance: See *People v. Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69. And such also is the ruling of our own court: *Jesse v. State*, 20 Ga. 156-166; *Smith v. State*, 63 Ga. 170; *Sewell v. State*, 76 Ga. 836. The judge in this case charged that the rule was, where one immediately flees to avoid arrest or trial, the presumption would be authorized that he fled from the consciousness of guilt. This, we think, was not a fair presentation of the law of this case; for there was evidence tending to show the flight was, not from the officers of the law, but to escape vio-

lence from the companions of the deceased, and the court made no qualification of its charge appropriate to the evidence just mentioned. Flight is, at most, only a circumstance which may be weighed by the jury, in connection with other circumstances, to determine guilt, and is of itself no such circumstance as authorizes the jury to presume guilt.

3. Another ground of the motion for new trial is, that the court erred in charging the jury the provisions of section 73 of the Penal Code, in relation to the homicide of a person, where the killing must be done in order to save the life of the slayer. It must be apparent that this law is wholly inapplicable to a case of this character. The provisions of this section apply only to cases of mutual combat, where one person endeavors in good faith to decline any further struggle. To such a person, it is only justifiable to slay his adversary after a bona fide effort to avoid all further difficulty: *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277. The slayer is protected in cases in which the provisions of this section apply, only when the killing was done as an absolute necessity to save his own life, and only in cases when it appears that the person killed was the assailant, or that the slayer had in good faith endeavored to decline any further struggle before he inflicted the mortal wound. There was no evidence of any mutual combat between the deceased and the accused preceding this homicide. On the contrary, the accused was in his house; the deceased on his premises ⁶⁸¹ without the house. There was no evidence of quarreling between them, nor of any attempt to fight, and the rules which determine the guilt or innocence of the defendant are not to be found in these provisions of law.

4. An exception is taken to the charge of the court which instructed the jury as follows: "If persons assemble before another's house and actually advance on him, and render it necessary for his protection, or make such demonstrations as to excite the fears of a reasonable man that it was their intention to commit a felony on him or some member of his family, he would be justified in shooting them; but if they merely threaten to commit violence, he is not justified in shooting until he has warned them off." We do not think this is a fair presentation of the provisions of our law which afford protection to one who resists an invasion of the home in which he dwells. Section 70 of the Penal Code declares that it is justifiable homicide for one to kill a person who, in connection with another or others, manifestly intends and endeavors in a

riotous and tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. It was held in the case of *Hudgins v. State*, 2 Ga. 173, that this provision of the Penal Code does not apply to a single individual, but contemplates the joint action of two or more persons; and that under this section the killing is justifiable when the assailants designed entering the habitation for the purpose of assaulting or of offering any personal violence to one of the inmates. So that this case establishes two propositions—that under this provision of the code it is justifiable homicide for one to kill another who, in company with some person or with other persons, intends and endeavors in a riotous and tumultuous manner to enter his habitation for the purpose of assaulting or offering personal violence to any person therein; and that it is not necessary, in order to justify, that such personal violence shall amount to a felony.

In the case of *Caldwell v. State*, 34 Ga. 10, where a number of persons went to the house of another and endeavored, against the will of the owner, to force an entrance, and, having broken 682 a window, one of them proceeded to enter the window and was shot by the prosecutor in the act, this court held that a fair test of whether the prosecutor was guilty of murder or even of manslaughter was whether the person killed was violently and unlawfully entering his dwelling. Again, under the provisions of section 72 of the Penal Code, if, after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the habitation of another cannot be prevented, it is justifiable homicide to kill the person so forcibly attacking and invading the habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended or might accrue to the person, property, or family of the person killing. Under the provisions of these two sections of our code, it must be apparent that the court erred in charging the jury as complained of. If, as a matter of fact, the evidence shows that more than one person, acting in concert and in the prosecution of a joint enterprise, went to the house of the plaintiff in error, then whether the provisions of section 70 of the Penal Code, above referred to, would apply, depends entirely upon whether they or one of them, in the prosecution of such common intent, manifestly intended and endeavored, in a riotous and tumultuous manner, to enter his

house for the purpose of assaulting or offering personal violence to any person therein. Then, if the defendant shot and killed one of such persons so intending and endeavoring to enter, it would be justifiable homicide. If, however, only one of such persons made a forcible attack and attempt to invade the habitation, and after persuasion, remonstrance, or other gentle measures, such attack and invasion could not otherwise be prevented, it was justifiable homicide to kill the person so making the attack and invasion. And this is manifestly right. The law protects not only the person and property of the citizen, but it protects his home, whether it be a hut or a palace; and he who seeks in a violent manner to enter that habitation, and will not heed the remonstrance or persuasion of the owner, but continues the attack and invasion, intending to do a serious injury either to the person who resides there, to his house, or to some member ⁶⁸³ of his family, forfeits his life, and he who in good faith, under such circumstances, takes the life of the person so invading his home, is guiltless of crime, and is acting in the due protection of himself and his family. We do not say that the facts show that the plaintiff in error is thus protected; but these are the principles of law which, on his theory of the case, should have been given in charge to the jury; and the charge, as complained of, did not present, as we consider, the provisions of law which afford the slayer protection under the circumstances enumerated in the statute.

Other than as herein referred to, the court committed no error in its charge to the jury which calls for a reversal of its judgment.

Judgment reversed.

All the justices concurring.

HOMICIDE — UNJUSTIFIABLE — MANSLAUGHTER.—Where the death of a human being is caused by the intentional use of a deadly weapon, provocation by words only cannot reduce the killing to manslaughter: *State v. Davis*, 50 S. C. 405, 62 Am. St. Rep. 837, and note. But see *Evers v. State*, 31 Tex. Cr. Rep. 318, 37 Am. St. Rep. 811. A dispute over property rights is not a sufficient provocation to reduce a killing to voluntary manslaughter: *Sellers v. State*, 99 Ga. 689, 59 Am. St. Rep. 253. Although a trespass, not amounting to a felony, will not justify murder, and is not of itself sufficient to reduce a homicide to manslaughter, yet if the circumstances show that the killing was the result of a sudden, violent impulse of passion, provoked by the trespass, especially if accompanied by an assault with a deadly weapon, and acted upon before the passion has time to cool, this is such provocation as will operate to reduce the crime to manslaughter: *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242.

HOMICIDE—JUSTIFIABLE—SELF-DEFENSE.—A murder purposely committed is not excusable on the ground of self-defense,

unless the slayer reasonably believed the killing to be necessary to save his own life, or to avoid great bodily harm: *Commonwealth v. McGowan*, 189 Pa. St. 641, 69 Am. St. Rep. 836; *Commonwealth v. Breyessee*, 160 Pa. St. 451, 40 Am. St. Rep. 729; *Pinder v. State*, 27 Fla. 370, 26 Am. St. Rep. 75.

HOMICIDE—JUSTIFIABLE.—If a dwelling-house is actually broken and entered by a portion of a party, combined and armed, for the unlawful purpose of depriving one of the inmates of his liberty, and carrying him away in the night-time, accompanied with an intent to commit a felony, the person thus assaulted, as well as the owner of the dwelling, may resist with such force as may be necessary, even to taking the life of those present aiding and assisting, as well as those actually breaking and entering: *Note to Jones v. State*, 8 Am. St. Rep. 458.

PULLMAN PALACE CAR COMPANY v. HALL.

[106 GEORGIA, 765.]

RAILROAD COMPANIES—SLEEPING-CAR COMPANIES.

The liability of a sleeping-car company to its passenger for personal baggage taken by him into the sleeping-car and of which he retains possession is neither that of an innkeeper, a common carrier, nor an insurer, but is that of a bailee for hire.

RAILROAD COMPANIES—SLEEPING-CAR COMPANIES—LIABILITY FOR THEFT.—A sleeping-car company is not liable as an insurer to a passenger for the loss by theft of personal property taken into the car by him and retained in his possession; but such company owes the passenger the duty of exercising reasonable care to guard his property from theft, and if, through want of such care, his property, such as he may reasonably carry with him, is stolen, the company is liable therefor. If, however, such care has been exercised by the company, and such goods have been stolen by a person not in its employ, it is not liable for the loss.

RAILROAD COMPANIES—SLEEPING-CAR COMPANIES—LOSS BY THEFT.—THE BURDEN OF PROOF is on a sleeping-car company to show that it has exercised reasonable care to prevent the theft of personal property belonging to its passenger, taken into the car by him and retained in his possession until the theft.

Dorsey, Brewster & Howell and H. M. Dorsey, for the plaintiff in error.

W. J. Spears, for the defendant in error.

766 LITTLE, J. The defendant in error brought suit in a justice's court against the car company for thirty dollars and fifty cents, being the value of a valise and its contents. Judgment in his favor was rendered for the amount for which he sued. The car company filed its petition for certiorari, after hearing which, the judge of the superior court sustained the judgment rendered in the justice's court, and dismissed the certiorari. The car company excepted. The case was tried in the justice's court on an agreed statement of facts, as follows: "It is agreed that L. H. Hall, the plaintiff, was a passenger on

the car Suwanee on October 25, 1894, said car leaving Cincinnati at 8 P. M.; that said passenger, Hall, occupied room H, assigned him by porter, porter placing valise therein in said car. Said passenger, Hall, took on board the articles set out in the bill of particulars attached to the suit, and it is agreed that the valuation therein placed on said articles is correct and reasonable. L. H. Hall was accompanied by W. C. Rawson. They engaged two lower berths in the same stateroom, and on going into the stateroom found the window up and put the window down. They together left their valises in the stateroom and went forward to the smoking-room just before the train started. Afterward, as they were leaving the station and as they were passing through yard, and as train No. 3 on the Q. & C., this being the train Hall was on, was slowing up at the C., H. & D. crossing about one mile from the central depot, from which they started and from where plaintiff boarded the train, the porter, Wright, caught a young man taking a large and small valise from the room H. When the thief saw the porter he dropped the large valise but ⁷⁶⁷ succeeded in getting away with the small valise, this being the valise of the plaintiff. At this point the porter ran forward to the smoking-room and pulled the air-cord, and was asked at that time, by Mr. Rawson, what he was doing that for, when he informed Rawson that some one had stolen a valise out of one of the staterooms. Rawson and Hall went back to see, and found that the thief had gotten Mr. Hall's, and would have gotten Rawson's but for the efforts of the porter, who caught Rawson's valise as the thief was taking it through the window. One door of the car was locked, and the conductor and the porter stood at the open end of the car, and Rawson does not know how the thief could have gotten in the car, as everyone was required to show a ticket before entering station and a sleeping-car ticket before getting on board the car. Valise was taken from open window in the side of car from room H, the thief being on outside clinging to window and standing on hog-chain of car. The porter, Wright, was in the aisle of the car at the time, and saw two tramps hanging on the outside of car and ran them off. Conductor's attention was immediately called to same, and train was stopped, but too late to get the valise. By the time the train had stopped the men had gotten too far away, and it was impossible to catch them. No suspicious person was noticed by the conductor or porter in the car. As train passed by Big 4 yards, where the valise was

stolen, it was going at the rate of from five to six miles an hour. Conductor and porter did all they could to save the valise after thief was discovered."

1. Under these admitted facts the question arises, first, What is the liability of a sleeping-car company to its passengers for personal baggage which the passenger takes with him in the sleeping-car? This court has, in two cases heretofore considered, ruled upon the liability of a sleeping-car company for the loss of goods of a passenger, where the same were lost at night when the passenger was sleeping.

In the case of *Kates v. Pullman's Palace Car Co.*, 95 Ga. 810, the action was to recover the value of certain money and papers which, it was alleged, were taken from the pocket of the plaintiff's clothing at night. This court in that case did not ~~768~~ undertake to define the precise relation which existed between a sleeping-car company and a passenger; but ruled that, from the character of the business in which the company was engaged, a duty on the part of the company was created to exercise some watch and care over the passenger, and, within certain reasonable limits, over his property as well, and that if a loss occurs the burden of proof is on the company of showing that it exercised such reasonable care, during the hours of the night, as was necessary to secure the safety of the passenger's property, and that the loss was not occasioned because of the failure on the part of the employes of the company to do so.

The other case to which we refer is that of *Pullman's Palace Car Co. v. Harvey*, 101 Ga. 733. There this court was asked to reverse the ruling made in the *Kates* case, *supra*, but, after consideration, adhered to such ruling. Chief Justice Simmons, in rendering the opinion in the case, said: "The law as to the liability of sleeping-car companies is not well settled. Courts in different states have laid down different rules as to their liability." And he suggests that legislation should be had defining the exact liability of sleeping-car companies to a passenger for loss of goods. In determining the question now under consideration, it seems to be necessary to define and fix the rule of liability which attaches to a sleeping-car company for the loss of goods which were stolen by some one not in the employ of the company, and while the passenger was awake. A fair examination of the question renders it necessary to note that the passenger, whose valise was taken from his berth or stateroom under the evidence in this case, had, on reaching the car, delivered to the porter of the car his valise, as is customary,

and that the valise had been taken to the stateroom or berth which had been assigned to the passenger, and in his presence there deposited; that finding the window to the berth or stateroom open, the passenger closed it, and then, leaving his valise, went forward to the smoking-room; that in no other manner did the company, by its employés, have charge of such baggage. Also the other facts, that the rear door of the car was locked, and the conductor and porter stood at the front door of the car; that while the car was in motion, the valise was taken ⁷⁶⁹ by a thief who stood on a rod underneath the car on the outside, and abstracted it through the window. In the case of *Blum v. Southern Pullman P. Car Co.*, 1 Flip. 500, Fed. Cas. No. 1574, as cited in *Voss v. Cleveland etc. Ry. Co.*, 16 Ind. App. 271, a number of reasons are given why a sleeping-car company is not liable as an innkeeper. Among these reasons are, that the peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections; that the innkeeper is given a lien upon the goods of his guests for the price of their entertainment; that the innkeeper is obliged to receive every guest who applies for entertainment, while the sleeping-car company receives only first-class passengers; that the innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests; and, unless otherwise provided by statute, his liability is unrestricted in amount, while the sleeping-car company contracts to furnish a bed only; that the conveniences of the inn are imperative necessities to the traveler—a sleeping-car is not; that the innkeeper has a right to exclude from his house all but his guests and servants; the sleeping-car company must admit the employés of the train to collect fares and control its movements; that the sleeping-car company cannot protect its guests in all particulars, because the conductor of the train has a right to put them off for nonpayment of fare, or for a violation of rules. The court in that case then ruled that sleeping-car companies are not subject to a passenger as an innkeeper.

The cases of *Pullman etc. Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258, and of *Pullman etc. Co. v. Gaylord* (Ky. 1884), 23 Am. Law Reg., N. S., 788, hold that a sleeping-car company is not liable for loss of the effects of a passenger as a carrier, because it is not a carrier; that the railway company is the carrier; that the carrier's liability depends upon his possession

of the goods; that a sleeping-car company does not have possession of the goods—they are in control of the passenger. It was also ruled in *Lewis v. New York Sleeping-Car Co.*, 143 Mass. 267, 58 Am. Rep. 135, that a sleeping-car ⁷⁷⁰ company is not liable as a common carrier nor as an innholder. But each of these cases rules that it is a clear duty of the car company to use reasonable care to guard the personal effects of passengers from theft, and if, through want of such care, such effects as he might reasonably carry with him are stolen, the company is liable. The rule of liability is stated by the Texas supreme court in the case of *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 Am. St. Rep. 31, as follows: "While a sleeping-car company does not assume toward personal baggage taken into a car by a passenger the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or upon an innkeeper as to guests, it is responsible in the same way as any common carrier for a failure to perform the duties which devolve upon a common carrier in relation to baggage of a passenger which is not given into its exclusive custody; and if, through a failure of the company to exercise reasonable care, the passenger's baggage is stolen, the company is liable therefor." In 2 *Shearman and Redfield on Negligence*, fifth edition, section 526, the author, discussing this subject, says: "For obvious reasons, the rule of absolute liability of a carrier of goods or innkeeper is not extended to cases of theft from passengers occupying berths in a sleeping-car"; and, citing *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644, says: "It is properly held, in view of such arrangements [of berths], and of the powerlessness of a sleeping passenger to defend his property from theft or his person from assault, that it is part of the contract of hiring the privilege of occupying a berth that protection should be afforded him by the car proprietor, with a degree of care and vigilance commensurate with the danger to which he is exposed." Mr. Wharton, in his *Law of Negligence*, seventh edition, section 610, says: "It has been urged that such a proprietor [sleeping-car company] is, if not a common carrier, at least an innkeeper, and therefore an insurer of the property of his guests. But it has been ruled in several cases that such a proprietor is not either a common carrier or an innkeeper, but is a special bailee, who is not an insurer, but is charged with the duty of exercising in his business a degree of care and diligence proportioned to risks to which those engaging places in

his cars are exposed." ⁷⁷¹ Elliott on Railroads, volume 4, section 1623, sums up from the rules in adjudicated cases, as follows: "Our conclusion is, that where the passenger takes his baggage into the coach with him and does not place it in charge of the railroad company or of the sleeping-car company, neither company is liable unless the loss of the baggage was caused by the negligence of one of the companies." Ray, in his work on Negligence of Imposed Duties of Passenger Carriers, 241, 242, citing authorities, says: "While it [the sleeping-car company] is not liable as a common carrier or as an innholder, as is said by some of the authorities, . . . it is its duty to use reasonable care to guard the passenger from personal injury and his property from theft, and if through want of such care . . . the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor": See, also, *Stevenson v. Pullman Palace Car Co.* (Tex. Civ. App. March 13, 1894), 26 S. W. Rep. 112; *Pullman etc. Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; *Chamberlain v. Pullman etc. Co.*, 55 Mo. App. 474; *Henderson v. Louisville etc. R. Co.*, 20 Fed. Rep. 437; *Belden v. Pullman Palace Car Co.* (Tex. Civ. App., Nov. 17, 1897), 43 S. W. Rep. 22. While there are decisions of a number of courts which have held sleeping-car companies liable to a passenger for the loss of his baggage, as a common carrier, and others which apply the law of liability as that of innkeepers, the weight of authorities, as we understand it, is, that such companies are not liable as innkeepers, nor as carriers, for personal effects taken with the passenger into the car and of which he retains possession. But it is the duty of such a company to use reasonable care to guard the property of the passenger from theft; and if, through the want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.

2. Such being the rule, the question which next arises is, Was the property of the passenger stolen through the failure of the employes of the company to exercise reasonable care for the protection of his property? It will be borne in mind that the passenger was not sleeping when his goods were stolen. A higher degree of care to protect the goods of a sleeping passenger would seem to be required than that which it is necessary to exercise when the passenger is awake and able to protect them himself; and while extraordinary diligence is not, under ⁷⁷² the law, required in either case, because the passenger does not intrust his effects to the company, but retains posses-

sion himself for his own comfort and convenience, yet, having engaged the accommodations offered by the company for the purpose of sleep during proper hours, and paid for the same, and the company having accepted him with the implied agreement that he should do so, the care which is reasonable to protect the goods of a sleeping passenger must be exercised. And while the same degree of care in the case of a passenger awake might not be required, yet, in each case, such care as is reasonable under the circumstances is required—for the want of it the company is liable—having exercised it, it is not. The court of appeals of Missouri, in the case of *Chamberlain v. Pullman Palace Car Co.*, 55 Mo. App. 474, held that, in a case where the porter in charge of the car was not directed to look after the effects of a passenger in his absence, “a passenger on a sleeping-car, who leaves his watch in his berth while he is in the toilet-room, is, as a matter of law, guilty of contributory negligence if it is stolen in his absence, and therefore cannot recover from the company for the loss.” Whether or not the property of the passenger, in the case at bar, was stolen because of the failure of the company to exercise reasonable care for its protection, must, of course, depend upon the manner in which, and by whom, the valise was stolen, and the precautions used to prevent the theft. The agreed statement of facts found in the record is somewhat confused. When critically examined, however, it appears that the train to which the sleeping-car was attached had left the station where the passenger boarded the car, and proceeded about a mile on its journey. The train reduced its speed to five or six miles an hour when it approached the crossing of another railroad. At that time one of the car doors was locked and the other guarded by an employé of the sleeping-car company. The valise was taken from the seat of the passenger on which it had been placed, through an open window, by a thief who was on the outside clinging to the window, and standing on the hog-chain of the car. The porter of the car was in the aisle, and ran off two tramps whom he saw hanging on the outside of the car, and discovered that another ⁷⁷³ thief had seized two valises. The porter caught one of the valises as the thief was taking it through the window. The other one he could not recover. Immediately, the employés of the car pulled the air-cord and had the train stopped, but the thief had gotten away with one of the valises. The circumstances of the theft were remarkable, and showed the perpetrator to have been a very daring lawbreaker, willing to incur not only the risk of violating the

law, but his personal safety as well. To guard all the windows of a moving car from rogues who did not hesitate to risk their lives in catching hold of a moving train with the hope of abstracting valuables would have required extraordinary diligence. Such acts, ordinarily, are not to be anticipated, and without such a degree of diligence could not have been prevented. To have securely fastened one of the doors of the car and guarded the other, while another employé stood in the aisle, was certainly as much as any anticipated danger would have required. Such precautions, in our judgment, amounted at least to reasonable care; and, no greater diligence than this being required under the rule, the company should not be held liable for the loss. For these reasons, it is our opinion that the certiorari should have been sustained and the judgment rendered in the justice's court set aside.

Judgment reversed.

The other justices concurring, except Lewis, J., dissenting.

MR. JUSTICE LEWIS dissented, on the ground that there was evidence authorizing the conclusion drawn by the jury upon the trial in the lower court that the sleeping-car company had not overcome the burden of proof resting upon it to show that it was in the exercise of reasonable care in protecting the property of the passenger from theft, and that, as the only ground assigned as error in the petition for certiorari was that the verdict was contrary to law and evidence, the court below did not abuse his discretion in denying the petition. Hence, his judgment should be affirmed.

RAILROADS.—SLEEPING-CAR CORPORATIONS are not answerable as innkeepers for the loss or theft of articles from their cars: *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 42 Am. St. Rep. 902. A sleeping-car company, so far as it renders service as an innkeeper, is subject to like liabilities and obligations, and is liable for a necessary article of wearing apparel belonging to a passenger in its car, which was placed in the care of its employés, and was stolen from the car, without any negligence on the part of the passenger: *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. Rep. 325. A sleeping-car company which hires cars to railroads, reserving only the right to collect fares for the use of berths, and to retain on each car its own conductor and porter, is not liable as a common carrier or innkeeper, but must use reasonable care to guard passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he may reasonably carry with him, are stolen, the company is liable therefor: *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 15 Am. St. Rep. 873; monographic note to *Pullman Palace Car Co. v. Lowe*, 26 Am. St. Rep. 331-340; and notes to *Pullman Palace Car Co. v. Pollock*, 5 Am. St. Rep. 34; *Illinois Cent. R. R. Co. v. Handy*, 56 Am. Rep. 850.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

**PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. MONTGOMERY.**

[152 INDIANA, 1.]

RAILROADS—ACTION FOR INJURY TO EMPLOYÉ CAUSED BY COEMPLOYÉ—COMPLAINT—SUFFICIENCY OF. In an action by a freight brakeman against a railroad company to recover damages for personal injuries resulting from the alleged negligence of the defendant's engineer, the complaint, under the Indiana statute, is good against a demurrer, for want of facts, where it states that the engineer, while in the service of the company, in charge of a locomotive, negligently injured the plaintiff, both being and acting at the time in the line of their duty as employés of the company. It is not necessary for it to state that, at the time of the injury, the engineer was acting in the place, and performing the duty, of the corporation.

STATUTES—SUFFICIENCY OF TITLE—DETAILS.—The title of an act need not go into details. It is sufficient if it indicates, with reasonable precision and clearness, the subject it embraces.

STATUTES—DETAILS IN TITLE MUST BE GERMANE TO SUBJECT OF ACT.—An act is not invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title.

STATUTES—SUFFICIENCY OF TITLE AS TO EXPRESSION OF SUBJECT—ILLUSTRATION.—The subject of an act, entitled, "An act regulating railroads and other corporations," is sufficiently expressed in its title, although the act creates a liability which, up to the time of such enactment, had no existence. The act is, therefore, not unconstitutional on the ground that its subject is not expressed in its title.

CONSTITUTIONAL LAW.—RAILROAD CORPORATIONS ARE "PERSONS," within the meaning of constitutional provisions, both state and federal, concerning equality of rights or equality of laws.

STATUTES—LIABILITY OF CORPORATIONS FOR INJURIES CAUSED TO EMPLOYE BY COEMPLOYE—CONSTITUTIONALITY.—A statute making railroad and other corporations, except municipal, answerable for injuries to their employes, resulting from the negligence of coemployes, does not deny to railroad companies the equal protection of the laws guaranteed by the state and federal constitutions, and is, therefore, constitutional.

STATUTES FIXING LIABILITY OF CORPORATIONS—LITIGATING CONSTITUTIONALITY OF.—If an act fixing the liability of all corporations, except municipal, is valid as to a railroad corporation, a railroad company cannot litigate its constitutionality as to other corporations.

STATUTES—FIXING LIABILITY OF CORPORATIONS—EXEMPTION OF MUNICIPAL CORPORATIONS—CONSTITUTIONALITY.—A statute fixing the liability of railroad and other corporations is not unconstitutional because it exempts municipal corporations from its operation, for there is no necessary similarity between railroad corporations and municipal corporations, and many statutes apply to the former that do not apply to the latter.

STATUTES—EXEMPTING CORPORATIONS FROM FUTURE LIABILITY—CONSTITUTIONALITY.—A statute which nullifies contracts made by railroad or other corporations, releasing them from future liability for personal injuries to employes, is not unconstitutional as violating the equality clause of either the state or federal constitution.

STATUTES—WHAT IS GERMANE TO SUBJECT OF ACT AND NEED NOT BE EXPRESSED IN TITLE.—The prohibition of contracts releasing corporations from their liability, contained in an act which enlarges the liability of railroads, is germane to, and properly connected with, that main subject of the act, and need not be expressed in the title.

RELEASE—CONTRACT OF—WHAT IS—INVALIDITY.—Under a statute which prohibits all contracts releasing corporations from liability for personal injuries to their employes, a contract between a railroad company and an employe, whereby the latter agrees that the acceptance of certain benefits shall operate as a release of all claims for damages against the company, is a conditional release of the company from liability, and is void under such statute.

TRIAL—EXCUSING JURORS.—No error is committed where no injury results from the court's action in excusing a juror on its own motion.

APPEAL—SPECIAL FINDINGS—SUFFICIENCY OF.—A special finding by a jury that, under the "rules" of a defendant railroad company, it was the duty of the engineer to do certain things, is supported by evidence of such duty, though no particular rule was introduced in evidence.

APPEAL—SPECIAL FINDING—CONFLICTING EVIDENCE.—A special finding must stand where there was any evidence to support it, though there was strong conflicting evidence.

TRIAL.—IF A SPECIAL VERDICT FAILS TO FIND MATERIAL FACTS, within the issue, which were established by the evidence, the remedy is not by a motion to coerce the jury into making such finding, but by a motion for a new trial by the party aggrieved.

APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.—If evidence, erroneously admitted over objection, is immediately withdrawn, and the jury is afterward instructed not to consider it, there is no available error.

DAMAGES.—PHYSICAL AND MENTAL SUFFERING may be considered in awarding damages in an action for personal injuries.

DAMAGES—MEASURE OF—COMPENSATION FOR PERSONAL INJURIES.—In an action for personal injuries, the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case.

S. O. Pickens, N. O. Ross, G. E. Ross, D. H. Chase, and G. W. Funk, for the appellant.

S. T. McConnell, A. G. Jenkins, J. C. Nelson, and Q. A. Myers, for the appellee.

³ McCABE, J. This action was brought by the appellee against the appellant to recover damages suffered by him on account of the alleged negligence of the defendant, resulting in a personal injury to the plaintiff. A demurrer to the complaint for want of sufficient facts, and a demurrer to the second paragraph of the answer, were overruled, and the issues joined were tried by a jury, resulting in a special verdict and judgment, over defendant's motion for a new trial, for three thousand dollars' damages.

The errors assigned call in question the rulings on demurrer, the refusal of a new trial, overruling motions for a venire de novo, for judgment in appellant's favor on the special verdict, and sustaining appellee's motion for judgment on the special verdict in his favor.

The only objection urged to the complaint is, that it shows that the plaintiff was a freight brakeman in the defendant's service on its railroad, and that it was the negligence of the engineer of the train on which he was serving that caused his injury, and that, under the fellow-servant rule, ⁴ there was no liability. The injury occurred on July 1, 1893, after the act approved March 4, 1893, took effect, touching the liability of railroads, commonly called the "employers' liability act": Acts 1893, p. 294; Burns' Rev. Stats. 1894, secs. 7083-7087; Horner's Rev. Stats. 1897, secs. 5206s-5206v.

Appellant's learned counsel contend that it is settled law that the employer is not liable to an employé for injuries caused by the negligence of a coemployé in the same general service, unless the employer was guilty of some negligence in employing the servant with knowledge of his negligent habits or incompetency, or retained him after knowledge of such negligence or lack of skill. There is no showing of any such neg-

ligence on the part of the appellant, as employer, in the complaint. Appellee concedes this to be the common-law rule, and that it prevailed in this state prior to the enactment above mentioned. Indeed, it is conceded by the appellee that his complaint depends upon that act for its sufficiency in its facts to constitute a cause of action, and is founded thereon.

It is first contended by the appellant that the act does not change the common-law rule, and it would seem to follow, if that is true, that the complaint is clearly bad. The first section provides: "That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases." Then follow four subdivisions specifying the cases in which liability is to attach, the fourth of which, and the one on which this action is founded, reads thus: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train, upon a railway, or where such injury was caused by the negligence of any person, coemployé or fellow-servant engaged in the same common service in any of the ⁵ several departments of the service of any such corporation, the said person, coemployé or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." Appellant's learned counsel say: "The complaint lacks two allegations to make it good under this provision: 1. That the engineer at the time was acting in the place and performing the duty of the corporation in that behalf; and 2. That appellee was obeying or conforming to the order of some superior at the time of such injury, having authority to direct. It was not alleged that the engineer was acting in the place or performing the duty of the master, or that appellee was acting in obedience to a superior," et cetera.

This language, together with other parts of appellant's brief, indicates that appellant's learned counsel construe the language of the statute above quoted as conveying the meaning that the right to recover against an employer for the negligence of a coemployé or fellow-servant rests upon the condition

that such negligent coemployé was at the time acting in the place and performing the duty that the master or employer owed to his or its servants or employé generally, and yet they do not say so in so many words. The majority of the court are of the opinion that the decision of that question is not necessary to the decision of this case. They hold that the only part of the fourth subdivision of said section which is necessary to be considered in determining the sufficiency of the complaint is the following: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any locomotive engine or train upon a railway, and the person so injured, obeying or conforming to the order of some superior ⁶ at the time of such injury, having authority to direct," and that hence it was not necessary that the complaint should state that the alleged negligent engineer, at the time he committed the alleged negligent injury, as provided in such concluding clause, was acting in the place and performing the duty of the corporation in that behalf, while the writer hereof is of the opinion that the whole of the fourth subdivision must stand together, and that the words quoted from the concluding clause qualify the liability created in the first clause or clauses. But the duty of the corporation therein mentioned, in the opinion of the writer, means, not the duty it owes to its servants, but the duty it owes to the public in carrying on its business; and the words "acting in the place of such corporation," with the other words quoted, were used to convey the idea that in order that the liability mentioned should exist, the negligent person, coemployé, or fellow-servant must be acting as such employé, in the line of his duty at the time of his negligence.

The writer is of opinion that the complaint is good under this construction; and the holding of the court is that, in order to make the complaint good under the first part of the subdivision quoted, as to the point in question, it is only required that it state that the engineer, while in the service of appellant, in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employé of the appellant. That being so, the averments of the complaint, showing, as they do, that at Hartford City, Indiana, the freight train upon which appellee was brakeman stopped to switch out loaded cars; that the conductor of said train, acting in the service of appellant, the authority and position of said conductor making it appellee's duty to obey his orders

in respect to said train and switching, ordered appellee to go between said cars to make couplings, and while so engaged the engineer in charge of said train, also ⁷ in appellant's service, and in the line of his duty, without signal, carelessly, negligently, and recklessly reversed said engine and applied full steam, whereupon said cars were driven and jammed together with terrific force, without notice to appellee, whereby appellee's entire right hand was caught between the bumpers and mashed off, without any fault on his part—make the complaint sufficient, under the statute, as to the objection thereto urged.

The next contention against the sufficiency of the complaint is that the act is unconstitutional, that being confessedly the foundation of the action. It is first contended that it violates section 19, article 4, of the state constitution, which provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." It is contended that the subject is not expressed in the title, in that the title is: "An act regulating liability of railroads and other corporations except municipal," while the provisions of the act itself are, as claimed by appellant, to create a liability which up to that time had no existence. The precise question here involved was decided adversely to appellant's contention on a statute similar to our own, under a constitution an exact copy of our own, in this respect, in *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338. We feel content to follow that case, without extending this opinion by repeating its reasoning, and, accordingly, hold that the subject is sufficiently expressed in the title.

The same rule has been, in effect, followed by this court in holding that the title of an act need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title: *Bitters v. Board etc.*, 81 Ind. 125; *Crawfordsville etc. Co. v. Fletcher*, 104 Ind. 97; *Benson v. Christian*, 129 Ind. 535; *State v. Kolsem*, 130 ⁸ Ind. 434; *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174; *Lewis v. State*, 148 Ind. 346.

In the course of some of the briefs filed in other cases involving the validity of the act, it is contended that the act is void, in that it violates section 22, article 4, of the state constitution, providing that: "The general assembly shall not pass local or special laws in any of the following enumerated cases,

that is to say, regulating the practice in courts of justice." That the act does not violate the provision quoted is settled by *Woods v. McCay*, 144 Ind. 316, and cases cited; *Mode v. Beasley*, 143 Ind. 306, and cases there cited; *Board etc. v. State*, 147 Ind. 476. Also, that it violates section 23 of the same article, requiring all laws to be of general and uniform operation throughout the state, where such a law can be made applicable. But that is a question for the legislature, whose determination is final and conclusive on the courts: *Mode v. Beasley*, 143 Ind. 306, and cases there cited; *Wood v. McCay*, 144 Ind. 316, and cases there cited.

It is next contended that the act violates section 23 of article 1 of the constitution, providing that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Railroad corporations are persons within the meaning of this provision of our bill of rights, and the equality clause of the fourteenth amendment to the constitution of the United States: *Charlotte etc. R. R. Co. v. Gibbes*, 142 U. S. 386; *Santa Clara Co. v. Southern Pacific Ry. Co.*, 118 U. S. 394; *Pembina etc. Min. Co. v. Pennsylvania*, 125 U. S. 187. The inequality complained of is that corporations, except municipal, are made liable for damages caused to one of their servants by the negligence of a coemployé or fellow-servant, without any negligence on the part of the employer, while other employers are left free from such liability to their employés.

Appellant also contends that the act violates the equality clause of the fourteenth amendment of the constitution of the United States, demanding for every person the equal protection of the laws. The same provision, quoted from the bill of rights in the constitution of this state, is found word for word in the bill of rights of the constitution of Iowa. The supreme court of that state, in upholding the employers' liability act of that state, held that the provision mentioned in the bill of rights in the constitution of that state was, in effect, the same as the equality clause of the fourteenth amendment to the federal constitution, and that the employers' liability act did not violate either constitution in respect to equality of laws or equality of rights secured by each of said provisions, in *Bucklew v. Central Iowa etc. Ry. Co.*, 64 Iowa, 611. That decision rests largely on two decisions made upon the subject of the constitutionality of the employers' liability act of Kansas and

that of Iowa in the supreme court of the United States. Mackey had recovered a judgment for twelve thousand dollars' damages against the Missouri Pacific Railway Company for injuries caused by a coemployé of that company, which, on appeal, was affirmed by the supreme court of Kansas. From that judgment the company appealed to the supreme court of the United States, on the ground that the Kansas statute violated the fourteenth amendment to the constitution of the United States. But that court affirmed the judgment, holding that the act in no way infringed that amendment: *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205. Mr. Justice Field, speaking for the court, there said: "The company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employés caused by the negligence or incompetency of a fellow-servant, which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, ¹⁰ or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow-servants in the same common employment, and acting under the same immediate direction. . . . Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company . . . is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the fourteenth amendment. . . . The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. . . . The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employés, though it may be by the negligence or incompetency of a fellow-servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt.

The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of ¹¹ municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. . . . A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed. . . . But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public." A like decision was made by the same court, upholding the employers' liability law of Iowa, which has been in force in that state ever since 1862: *Minneapolis etc. Ry. Co. v. Herrick*, 127 U. S. 210. The Iowa statute is expressed in fewer words and better language than our own. It reads thus: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employés, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding": Iowa Rev. Stats. 1873, sec. 1307. ¹² Herrick was injured in Iowa by the negligence of a fellow-servant in the employ of said railroad

company. He sued and recovered against the company on the Iowa statute in the state court of Minnesota, which judgment was affirmed in the supreme court of that state, upholding the constitutionality of the Iowa statute: *Herrick v. Minneapolis etc. Ry. Co.*, 31 Minn. 11, 47 Am. Rep. 771; *Herrick v. Minneapolis etc. Ry. Co.*, 32 Minn. 435. On appeal to the supreme court of the United States, the constitutionality of the Iowa statute was upheld on the authority of *Missouri etc. Ry. Co. v. Mackey*, 127 U. S. 205, as above stated.

Some ten or twelve states of the Union have such acts on their statute books, and none of them have ever been held unconstitutional, while the following decisions of state supreme courts have held such legislation to be constitutional and valid: *McAunich v. Mississippi etc. Ry. Co.*, 20 Iowa, 338; *Bucklew v. Central Iowa etc. Ry. Co.*, 64 Iowa, 611; *Rose v. Des Moines etc. Ry. Co.*, 39 Iowa, 246; *Kansas etc. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Missouri Pac. Ry. Co v. Mackey*, 33 Kan. 298; *Attorney-General v. Chicago etc. Co.*, 35 Wis. 425; *Ditberner v. Chicago etc. Ry. Co.*, 47 Wis. 138. The questions decided by this court in *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477, are analogous to and on the same lines as the cases just cited.

Appellant's learned counsel have urged upon our attention *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, as probably declaring a different rule. The reference to that case is fortunate, because, while it does not in the least depart from the rule laid down in the two cases above cited, it lays down some principles governing the subject, doubtless in mind in both of the other judgments of the federal supreme court, but not deemed necessary in those cases to be fully stated. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "That such corporations may be classified for ¹³ some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double

damages in case of loss are inflicted: *Missouri etc. Ry. Co. v. Humes*, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting on others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.”

Objection is made to the validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that ¹⁴ their business may not be peculiarly dangerous to life and limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad corporation, cannot be permitted to litigate the constitutionality of the act as to other corporations: *Henderson v. State*, 137 Ind. 552; *Board etc. v. Reeves*, 148 Ind. 467; *Currier v. Elliott*, 141 Ind. 394. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

It is also urged, as an objection to the validity of the act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed as railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employes as to call for such special legislation as is called for in case of railroad corporations

to protect their employés. We therefore conclude that the act does not violate the constitution, either federal or state.

It is next contended that the circuit court erred in sustaining the plaintiff's demurrer to the second paragraph of the defendant's answer. It sets up that on the eighth day of March, 1893, and prior to the defendant's injury, he became a member of the voluntary relief department of the Pennsylvania lines west of Pittsburgh, and was such member at the time he was injured, and so continued long after his said injury; that the management of said department is under the charge of said lines west of Pittsburgh; that said fund is made up of stated contributions from said lines, and the employés thereon, and said lines guarantee the fulfillment of all the obligations of said department, and make up and pay all deficiencies in the amounts necessary to pay all benefits to its members. In becoming a member of said relief department ¹⁵ he agreed to be bound by its rules and regulations, among which was that each member, on complying with its rules, was entitled to receive stipulated benefits on account of disability incurred by injury received by such member in the service of the company. This agreement is all set forth in the appellee's written application for membership, and signed by him; and among the stipulations contained therein is the following, namely: "And I agree that the acceptance of benefits from the said relief fund for injury or death shall operate as a release of all claims for damages against said company arising from injury or death which could be made by or through me, and that I, or my legal representatives, will execute such further instrument as may be necessary formally to evidence such acquittance." And it is further averred that after receiving the injury complained of, while disabled thereby, he accepted benefits from said relief department to the amount of three hundred and eighty-five dollars.

But it is contended by the appellee that by the fifth section of the act we have been considering the contract set up in this answer as a bar is made void. The contract set up is shown therein to have been entered into after the act took effect and became a law. The section reads thus: "All contracts made by railroads or other corporations with their employés, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employé having a right of action under the provisions of this act, are hereby declared null and void": Burns' Rev. Stats. 1894, sec. 7087. The balance

of the section makes the whole act apply to future injuries and not to past. The validity of this section is assailed on the grounds that it violates the bill of rights and the fourteenth amendment of the federal constitution. What we have said as to the validity of the other parts of the act, under these constitutional provisions, is applicable to this section, and hence it must be held not to infringe them.

And it is further insisted by appellant that said section violates section 19 of article 4 of the state constitution, in ¹⁶ that the subject of the fifth section is not expressed in the title, nor properly connected with the subject expressed in the title. The prohibition of contracts releasing corporations from their liability, as prescribed in the act, is germane to and properly connected with that main subject of the act, and hence the matter of the fifth section thereof need not be expressed in the title: *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174, and cases there cited; *Warren v. Britton*, 84 Ind. 14; *Bitters v. Board etc.*, 81 Ind. 125; *Benson v. Christian*, 129 Ind. 535; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Bank of the State v. New Albany*, 11 Ind. 139; *State v. Sullivan*, 74 Ind. 121; *Indianapolis v. Huegele*, 115 Ind. 581; *Hunter v. Burnsville etc. Co.*, 56 Ind. 213; *Walker v. Dunham*, 17 Ind. 483; *McCaslin v. State*, 44 Ind. 151; *State v. Kolsem*, 130 Ind. 434; *Shoemaker v. Smith*, 37 Ind. 122; *Crawfordsville etc. Co. v. Fletcher*, 104 Ind. 97; *Barnett v. Harshbarger*, 105 Ind. 410; *Hunt v. Lake Shore etc. Ry. Co.*, 112 Ind. 69. We therefore hold that the fifth section is not invalid, because it is a matter properly connected with the subject of the act.

Assuming that it is valid, and makes a contract releasing or relieving corporations from liability under the act absolutely void, appellant's learned counsel contend that there is nothing in the agreement set forth in the second paragraph of the answer relieving or releasing the company from liability for negligence, or from any liability whatever. They say appellee "elected to accept benefits from the relief fund, and, having done so, he cannot maintain this action for damages. That is the essence of his agreement." Appellant's counsel further say in one of their briefs that "the payment and acceptance of benefits under the terms of the contract in this relief fund is simply a compromise and settlement of the claim of the injured employé against the company." Let us suppose that the above statement is true; it is certainly the strongest and best state-

ment that can be made of appellant's position. ¹⁷ What is it that makes the acceptance of benefits from the relief fund a compromise and settlement of appellee's claim? Only one answer can be made to this question, and that is that the antecedent contract alone makes it such. There is no allegation in the answer that in accepting the benefits appellee made any agreement or compromise whatever, and there is no claim that he did. He simply accepted that which he had a legal and moral right to demand. His own contributions helped to create the fund, and his injury brought him within the rules and regulations entitling him to the benefits. So, even if it was a compromise and settlement, it was such wholly and solely by virtue of the antecedent contract—a contract executed before the injury occurred; and, that being so, it amounts to nothing more than an attempt to secure a release of future liability under the act, call it by whatsoever name we may. But such acceptance is not, in any proper or legal sense, a compromise and settlement of liability under the act. The language of the contract is: "And I agree that the acceptance of benefits from said relief fund shall operate as a release of all claims for damages against said company, arising from such injury or death," et cetera. So, by the express terms of the contract, it is a release, and not a compromise and settlement. The acceptance of benefits shall operate as a release. But what makes it so? If the antecedent contract was abrogated, the acceptance of benefits would have no effect whatever upon the question of appellant's liability under the act; because he had a legal and moral right, as before remarked, to demand and receive such benefits. So, if the release takes place, it is not by virtue of the acceptance, but it is by the force, vigor, and effect of the antecedent contract. It breathes that effect into the acceptance.

But it is contended that the contract does not, of itself, operate as a release of liability under the act. The only difference between it and a contract of absolute release is that the ¹⁸ one would be unconditional while the other is conditional. The conclusion seems unavoidable that the contract here is a conditional release of appellant from liability under the act. The condition upon which it is to become absolute is the acceptance of benefits from the relief fund. Section 5 of the act makes "all contracts . . . by any corporation releasing or relieving it from liability" under the act "null and void."

Appellant's learned counsel contend that an exact copy of this contract was held valid in the following cases: *Johnson v.*

Philadelphia etc. R. R. Co., 163 Pa. St. 127; Ringle v. Pennsylvania R. Co., 164 Pa. St. 529, 44 Am. St. Rep. 628; Lease v. Pennsylvania Co., 10 Ind. App. 47; Donald v. Chicago etc. Ry. Co., 93 Iowa, 284. The first three cases just cited were decided in states not having employers' liability acts forbidding contracts of this kind in force at the time the injury sued for occurred. And they proceeded upon the sole ground that the contract did not violate public policy, and therefore they were upheld. But the Iowa case was decided in a state having in force at the time such an act. But in that case the injury resulted in death and the administrator of the deceased had recovered a judgment against the company for the benefit of the mother of the deceased on account of his death, on a similar statute to our own. The deceased was a member of the relief association very similar to the one here involved. The case decided in Donald v. Chicago etc. Ry. Co., 93 Iowa, 284, was a suit by the mother against the relief association for the five hundred dollars death benefits provided by the rules of the association. The case was decided against her because of the following stipulation in the contract signed by the deceased when he became a member of the relief association, namely: "Should a member or his legal representative bring suit against the company . . . for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be ¹⁰ made until such suit is discontinued; and if suit shall proceed to judgment or shall be compromised, all claims upon the relief fund for benefits on account of such injury or death shall be thereby precluded." That contract does not seek to avoid the liability of the company under the Iowa act, and hence was a perfectly legal contract. As before observed, the other cases involved the question whether such a contract as that now before us was invalid because of its violation of public policy. Without either approving or disapproving of the rule laid down by the Pennsylvania supreme court and our own appellate court, yet the United States circuit court for the district of Colorado decided the question the other way in a strong and able opinion in Miller v. Chicago etc. Ry. Co., 65 Fed. Rep. 305; and we think there is a marked distinction in the rule where a contract is charged with violating public policy, and where it contravenes a positive statutory prohibition, and especially where the statute provides that the inhibited contract shall be null and void. In Barrett v. Carden, 65 Vt. 431, 36 Am. St. Rep. 876, the su-

preme court of Vermont said: "The defendant insists that the alleged undertaking of the plaintiff is contrary to public policy, and that for this reason the bond shall be declared void. Courts will not declare contracts void on grounds of public policy except in cases free from doubt, and prejudice to the public interest must clearly appear before a court is justified in pronouncing an instrument void on this account. In *Richmond v. Dubuque etc. R. R. Co.*, 26 Iowa, 191, it is said: "That the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

. . . . In *Richardson v. Mellish*, 2 Bing. 229, 9 Eng. Com. L. 558, Sir James Burrough said: 'I protest as my lord has done against urging too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may ²⁰ lead you from the sound law. It is never urged at all but when other points fail.' In *Walsh v. Fussell*, 6 Bing. 169, 19 Eng. Com. L. 83, Lord Chief Justice Tindale, in pronouncing judgment, said: 'It is not contended that the covenant was illegal on the ground of the breach of any direct rule of law or the direct violation of any statute, and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public.'"

As was said in *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793: "Where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper. . . . Now, the intention of the contract was to contravene the statute, and this intention is revealed in the contract. This renders the contract vicious and unenforceable."

An eminent author says: "By public policy is intended that principle of law which holds that no citizens can lawfully do that which has a tendency to injure the public, or which is against the public good. Courts will not declare contracts void on grounds of public policy except where the case is free from doubt, and where an injury to the public interest clearly appears. A doubtful matter of public policy is not sufficient to invalidate a contract": 2 Beach on Modern Law of Contracts, sec. 1498, and authorities there cited.

It might be difficult to say that such a contract has a tendency to injure, or is against the public good, beyond all doubt. On the other hand, the same author says, section 1447, that: "Contracts requiring the performance of acts forbidden by statute, or tending to promote such acts, are void, even though the statute does not declare them void": See the authorities there cited. The same author, in section 1443, says: "Whatever tends to interfere with the beneficial ²¹ operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful; and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated. . . . The law attempts to close the doors to temptations by refusing such parties recognition in the courts": See authorities there cited.

It is laid down in 3 American and English Encyclopedia of Law, 872, that: "Where a transaction is forbidden by a statute it is void; the grounds of the proposition are immaterial." As we have before said, the contract in question is a release of appellant's liability under the act upon a certain condition. That it is a conditional release of such liability, dependent upon the happening of the condition, namely, the acceptance of said benefits by appellee, there can be no doubt. If that condition happens, as it did, appellant's liability under the act is released by virtue of the antecedent contract, if it is enforced. If it is enforced, it must be so done in violation of the statute which makes all such contracts null and void. That certainly more than tends to obstruct both the letter and spirit of the statute. Our cases are to like effect in holding that a contract in violation of a statute is void: *State Bank v. Coquillard*, 6 Ind. 232; *Cassaday v. American Ins. Co.*, 72 Ind. 95. And the same is true if any part of the contract is in violation of the law and the consideration unseverable: *Daniels v. Barney*, 22 Ind. 207; *Case v. Johnson*, 91 Ind. 477; *Benton v. Hamilton*, 110 Ind. 294; *Woodford v. Hamilton*, 139 Ind. 481; *Sandage v. Studebaker etc. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165; *Sullivan v. State*, 121 Ind. 342.

But the contract is only conditionally in conflict with the statute; that is, if the condition never happens, it does not and never can conflict with the statute. But it is equally true if the condition does happen it will directly conflict with the statute. One of the most learned of law writers upon this topic says: "A condition is a limitation making a ²² contract arbi-

trarily dependent on an event at the time uncertain": 1 Wharton on Contracts, sec. 545. And in section 548 the same learned author says: "The promisor is not to be bound only in the future; he is bound from the time he makes the promise; and the title he passes vests subject to the condition. Any intermediate disposition of the title made by the promisor before the happening of the condition is subject to the condition. . . . The promisor, also, who agrees to convey an estate on a future contingency, is liable in damages if he makes his compliance with his promise impossible, or subjects the property to waste." And in section 551 he further says: "The same may be said of all contracts to be performed on the happening of a certain event. The contract binds from the time it is made, and ceases to bind on the nonoccurrence of a certain event, which is, therefore, in this sense, a condition subsequent." To the same effect is Clark on Contracts, Hornbook series, section 277, page 663.

If we were even mistaken in construing this contract as a conditional one, so as to bring it within the principles above laid down and within the condemnation of the statute in question, it unquestionably falls within the principle laid down by Wharton, thus: "The prohibition of a statute cannot be evaded by putting a contract in a shape which, while nominally not inconsistent with the statute, virtually contravenes its provisions. This has been frequently held with regard to stipulations evading usury statutes, and with regard to assignments evading bankrupt laws. If a contract conflicts with the general policy and spirit of a statute governing it, it will not be enforced, although there may be no literal conflict": 1 Wharton on Contracts, sec. 362. In *State v. Forsythe*, 147 Ind. 466, it was said: "In chapter 4, section 1, of Maxwell on the Interpretation of Statutes, under the title of 'Construction to Prevent Evasion,' it is accordingly said, at pages 133 and 134: 'It is the duty of the judge to make ²³ such construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined. In *fraudem legis* facit, qui, *salvis verbis legis*, *sententiam ejus circumvenit*; and a statute is understood as extending to all such circumventions, and rendering them unavailing. Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. When the acts of the parties are adopted for the pur-

pose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act, simply because, according to the true construction of the statute, it is the thing thereby prohibited. Whenever courts see such attempts at concealment, they brush away the cobweb varnish, and show the transaction in its true light. They see things as ordinary men do, and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it. In all such cases it is, in truth, rather the particular transaction than the statute which is the subject of construction; and, if it is found to be in substance within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked.'"

We are therefore of opinion that the contract set up in the second paragraph of the answer is in contravention of the statute, and hence, by force thereof, the contract so set up is null and void; and that being so, said answer was bad, and the circuit court did not err in sustaining the demurrer thereto for want of sufficient facts.

It is complained under the motion for a new trial that the circuit court erred in excusing on its own motion the juror Overholser, who it is alleged was a competent juror, over appellant's ²⁴ objection. But it is not shown that the jury which was finally impaneled was not a fair and impartial jury. In such a case, the matter is very much in the discretion of the trial court, and no error is committed where no injury results from the court's action in excusing the juror: *De Pew v. Robinson*, 95 Ind. 109. It is not even claimed that any injury resulted therefrom. We therefore conclude there was no error committed in excusing the juror.

It is further contended that the seventh item in the special verdict is not supported by the evidence. It reads thus: "We further find that, under the rules of the defendant company governing the operation of defendant's freight trains in cases where it became necessary for brakemen to go between defendant's cars, attached to the engine drawing the same, for the purpose of making couplings, it was the duty of the engineer in charge of the engine of said train, after receiving a signal from a brakeman, to stop the engine and train for the purpose of allowing such brakeman to pass between the cars thereof

and make a coupling, to obey a signal and stop the engine and train, and so remain until receiving a signal from some member of the train crew to back or pull forward." Counsel say: "The evidence does not sustain this finding. There was no evidence of such a rule." The finding is not that there was such a rule, but that, "under the rules of the defendant," not rule, "it was the duty of the engineer" to do certain things. Those rules might have been such as were adopted by the company, or such as by long usage and custom had become understood as incumbent on appellant's servants. We think there was evidence sufficient to support this finding.

The tenth finding was objected to because the evidence on that branch of the verdict was not sufficient to sustain it, but there was evidence sufficient to support it, though there was strong conflicting evidence. We can only look to that part of the evidence that supports the finding.

It is also complained that the circuit court erred in refusing ²⁵ to require the jury to return to their room and insert in their special verdict certain facts specified. To have sustained the motion would have been an invasion by the court of the province of the jury to determine the facts. If a special verdict fails to find material facts, within the issue, which were established by the evidence, the remedy is not by a motion to coerce them into making such finding, but by a motion for a new trial by the party aggrieved: *Brazil etc. Co. v. Hoodlet*, 129 Ind. 327, and cases there cited; *Vinton v. Baldwin*, 95 Ind. 433, and cases there cited; *Lafayette v. Allen*, 81 Ind. 166, and cases cited.

Overruling appellant's objection to the question and answer of the witness Ballard is also urged as error. The appellee's counsel had asked the witness the question what danger there was to appellee's life at the time witness saw him, and he answered, "I considered him in a great deal of danger; a man continuing in that condition could not live many days." Appellee's counsel immediately withdrew the evidence, and the court, at the request of appellant's counsel, instructed the jury not to consider such evidence. There was no available error in the ruling.

Complaint is made of the third instruction given by the court: "That in estimating the plaintiff's damages it is proper . . . that you should take into consideration the plaintiff's physical and mental suffering." In *Wabash etc. Ry. Co. v. Mor-*

gan, 132 Ind. 438, an instruction "that in making such estimate the jury should take into consideration appellee's physical and mental suffering, if any were caused by and arising out of the injury," was upheld as not an "erroneous statement of the rule governing the assessment of damages contained in either of the instructions." There was no error in giving the instruction.

The fourth instruction is complained of, reading, as appellant's counsel say in their brief, thus: "The jury are instructed that if they find that the plaintiff has proved by a preponderance of the evidence the injuries he has sustained ²⁶ as charged in the complaint, then every particular and phase of the injury may enter into the consideration of the jury in estimating his damages, loss of time with reference to his condition and ability to earn money in his business or calling, his loss from permanent improvement of his physical powers, his pain and suffering already endured, and that may be endured, from his injuries in the future, his personal disfigurement; and the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case." The appellee's counsel have copied the same instruction into their brief, except the word printed "improvement" in appellant's copy of the instruction, is printed "impairment" in appellee's copy. Neither brief cites us to the place in the transcript where the instruction can be found, and we have spent some time hunting for it, without success. Under such circumstances, we are justified in assuming that the word "improvement" in appellant's copy is a clerical or typographical error, and that the real instruction had the word "impairment" in it instead of the word "improvement," as set out in appellant's brief. Indeed, if the word "improvement" were in the transcript, instead of the word "impairment," it is so manifestly a clerical mistake in copying the instruction that we are authorized to read it "impairment" instead of "improvement": *Landon v. White*, 101 Ind. 249; *Indiana etc. Ry. Co. v. Dailey*, 110 Ind. 75. With that reading the instruction is correct: *Wabash etc. Ry. Co. v. Morgan*, 132 Ind. 438. We have thus patiently gone over all the rulings of the circuit court urged and properly presented here as error, and conclude that the circuit court did not err in overruling the motion for a new trial.

The judgment is affirmed.

STATUTES—EXPRESSION OF SUBJECT IN TITLE—DETAILS.—The title of an act is sufficient, if the provisions of the act are germane to the general subject expressed in its title. It need not include details or auxiliary provisions: See *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492; and monographic note to *Bobel v. People*, 64 Am. St. Rep. 73, 74, 75, on the sufficiency of the title to a statute. The title of an act relating to railway companies is sufficient where the general subject is indicated in the title, and the provisions of the act are germane to the subject expressed in the title: Note to *Bobel v. People*, 64 Am. St. Rep. 103.

STATUTES IMPOSING LIABILITY—RAILROADS.—A statute may create a liability against a railway company in favor of their employés injured through the negligence of a fellow-servant: See monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 169, on the protection of corporations from special and hostile legislation.

STATUTES—CONSTITUTIONALITY—RELEASE FROM LIABILITY.—The constitutionality of a statute cannot be questioned by one whose rights it does not affect, and who has no interest in defeating it: *County Commrs. v. State*, 24 Fla. 55, 12 Am. St. Rep. 183; *Sullivan v. Berry*, 83 Ky. 198, 4 Am. St. Rep. 147. In the absence of a statute prohibiting it, a contract by an employé of a railroad company, releasing it from a claim for damages, in case of injury, upon accepting the benefit of a relief fund, is valid and binding: *Chicago etc. R. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456, and note.

APPEAL—SPECIAL FINDINGS—CONFLICTING EVIDENCE. A finding of fact made by a jury or trial judge will not be disturbed by the appellate court if it is supported by competent evidence: *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607. If there is any legal and competent evidence to support a finding of fact, it is a general rule that the judgment will not be disturbed, though the evidence is conflicting: *Lathrop v. Tracy*, 24 Colo. 382, 65 Am. St. Rep. 229.

APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE. Error without prejudice is no ground for a reversal of judgment: Note to *Maynard v. Locomotive etc. Ins. Assn.*, 67 Am. St. Rep. 607. An error in the admission of evidence is cured by its withdrawal from the jury: *Hicks v. New York etc. R. R. Co.*, 164 Mass. 424, 49 Am. St. Rep. 471.

DAMAGES—MEASURE OF RECOVERY FOR PERSONAL INJURIES.—PHYSICAL AND MENTAL SUFFERING may be considered in awarding damages in an action for personal injuries: *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 55 Am. St. Rep. 705, and note.

DAVIS v. STATE.

[162 INDIANA, 84.]

STATUTES—EX POST FACTO LAW—WHAT IS NOT—METHOD OF FIXING AMOUNT OF PUNISHMENT.—An indeterminate sentence law which does not add to, or increase, the punishment of an offense beyond that existing at the time of its commission is not ex post facto, though the crime was committed before the passage of the act. A different method of fixing the amount of punishment between certain limits, which merely mitigates the punishment, does not add to or increase it.

STATUTES—EX POST FACTO LAW—WHAT IS NOT—PRISON CREDITS.—An indeterminate sentence law is not *ex post facto* on the ground that it repeals a “good time” law, where the former simply substitutes a new and different method of crediting good time to the convict, and the latter is merely a rule for the government of prison officials, not applicable to one sentenced under the former law.

ASSAULT — ERRONEOUS INSTRUCTION — DEADLY WEAPON.—An instruction which informs the jury that a person assaulted by another, who has no weapon in his hands, or the appearance thereof, is not justified in using a deadly weapon in defense of his person, is erroneous.

INSTRUCTIONS—PRINCIPLES GOVERNING.—An instruction must not only state correct legal principles, but so state them that the jury may be enabled to apply them to the evidence.

INSTRUCTIONS—WHEN ERRONEOUS.—An instruction is erroneous, although correct as an abstract proposition of law, if it leaves the jury in doubt or uncertainty as to how it should be applied to the evidence.

M. Z. Stannard, for the appellant.

W. L. Taylor, attorney general, W. A. Ketcham, Merrill Moores, and Dickey & Aydelotte, for the state.

35 McCABE, J. The appellant was tried by a jury in the Clark circuit court on an indictment charging him with an assault perpetrated April 13, 1896, on one Thomas Glynn, with the felonious intent to murder the said Glynn. The jury found appellant “guilty of the crime charged in the indictment, and that he be fined in the sum of fifty dollars, and that his age is fifty-four years.” On this verdict the circuit court rendered judgment that he be confined in the state prison not less than two and not more than fourteen years, and for the fine of fifty dollars and costs, over appellant’s motions for a new trial, for a *venire de novo*, and in arrest of judgment. The assignment of errors calls in question these several rulings as the sole grounds on which a reversal of the judgment is sought. Under the motions for a *venire de novo*, and in arrest of judgment, it is contended by appellant that the act approved March 8, 1897, the only law authorizing such a verdict and judgment, known as the indeterminate sentence law, is unconstitutional as to this case, because, as applied to this case, it is an *ex post facto* law, the alleged crime having been committed before the passage of the act. The constitutionality of the act in all other respects has recently been upheld by this court in *Vancleave v. State*, 150 Ind. 273; *Wilson v. State*, 150 Ind. 697; *Miller v. State*, 149 Ind. 607.

Section 24 of article 1 of the bill of rights in the constitution

provides that "no ex post facto law . . . shall be passed." Section 69 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 69.) The question is, What is an ex post facto law? This court, as ³⁶ far back as 1822, defined the meaning of the phrase as follows: "The words 'ex post facto' have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy": *Strong v. State*, 1 Blackf. 193. To the same effect are *Dinckerlocker v. Marsh*, 75 Ind. 548; *Hicks v. State*, 150 Ind. 293; *Commonwealth v. Mott*, 21 Pick. 492; *State v. Arlin*, 39 N. H. 179; *Mullen v. People*, 31 Ill. 444. At the time of the decision in *Strong v. State*, 1 Blackf. 193, the same provision, as to ex post facto laws, existed that exists now: Rev. Stats. 1843, art. 1, sec. 69. In that case, the punishment of the offense was changed by law from whipping not exceeding one hundred stripes to confinement in the state prison, after the commission of the offense and before the conviction. The sentence to a fine and confinement in the penitentiary at hard labor for a year and a day was affirmed as not being ex post facto. If the substitution of confinement in the state prison at hard labor for a period not exceeding seven years in place of whipping not exceeding one hundred stripes, as the statute in that case provided, being enacted after the offense was committed, could not be deemed to add to or increase the punishment by the new law, and hence not ex post facto, much more can it be justly held that the indeterminate sentence law does not add to or increase the punishment of appellant's offense, beyond that existing at the time of its commission. The punishment by law at the time of the commission of the offense charged in the indictment was and is imprisonment in the state prison not more than fourteen years, nor less than two years, and a fine not exceeding two thousand dollars. The indeterminate sentence law has not changed this, but only prescribes a different method of fixing the amount of punishment within ³⁷ those limits. And taking that whole law together, and reading it into the judgment of conviction in its reformatory character, it mitigates the severity of the punishment as prescribed in the Criminal Code, as we substantially held in *Miller v. State*, 149 Ind.

607, and hence it does not add to or increase the punishment, and is therefore not an *ex post facto* law as applied to this case. Such is the rule held in *Commonwealth v. Brown*, 167 Mass. 144; *In re Conlon*, 148 Mass. 168; *State v. Peters*, 43 Ohio St. 629.

The contention that the act is *ex post facto* because it repeals the good time law cannot be sustained. That law relates only to rules for the government of the prison officials. The indeterminate sentence law simply substituted a new and different method of crediting good time to the convict. The good time law does not apply to one sentenced under the indeterminate sentence law or the reformatory act.

Under the motion for a new trial, numerous instructions are complained of, one of which, given by the court on its own motion, is as follows: "12. Even if you believe the prosecuting witness made a rush or attack upon the defendant when he came out of his house, if you believe the prosecuting witness had no weapon in his hands or appearance thereof, then I instruct you that the defendant was not warranted in using a deadly weapon."

And another, given at the request of the prosecuting attorney, was as follows: "11. An assault or an assault and battery by a person upon another with his hands, arms, or head, or the force or momentum of his body, does not justify the use of a deadly weapon."

The defendant was a one-armed man, his right arm having previously been amputated at the shoulder, and the evidence tended to show that Glynn and others had engaged in a quarrel with defendant in Jeffersonville, and that Glynn had drawn a beer faucet on defendant as if to strike him; that defendant immediately left them, and went to his residence in said city, and was followed by said Glynn along the ³⁸ streets thereof; that defendant went into his house and got a revolver; and that Glynn, being a stout, robust man, stopped at defendant's front door, and, on defendant's coming out of his house, Glynn made a rush at defendant, to attack him, in a state of intoxication and a rage and passion, and defendant shot at him. These instructions inform the jury that a person assaulted by another, who has no weapon in his hands, or the appearance thereof, is not justified in using a deadly weapon in defense of his person. If that is the law, then in every conceivable case of a violent attack upon one by another, no matter what the circumstances may be, no matter what the disparity between the ages and

physical strength of the two may be, the assaulted party must stand and take his chances of being knocked down and stamped into a jelly, or of being choked to death before he can lawfully use a weapon in his defense. Though the appearance and circumstances of the assault were such as to induce the reasonable belief to be honestly entertained by the defendant that his life was in danger, or that he was in danger of great bodily harm from the assault, he could not lawfully use a deadly weapon to repel such assault, unless the assailant had a weapon in his hands, or the appearance thereof, no matter how many he had about his person. This is not the law: *Presser v. State*, 77 Ind. 274-278; *Batten v. State*, 80 Ind. 394; *McDermott v. State*, 89 Ind. 187. But, we have a case where an assailant was convicted of manslaughter, where he used nothing but his hands, thereby choking his victim to death, and that judgment was affirmed in this court: *Shields v. State*, 149 Ind. 395.

It is insisted by the state, however, that these instructions were correct as abstract propositions of law, and, construed along with other instructions given, make them altogether as a whole a correct statement of the law. As was said by this court in *Abbitt v. Lake Erie etc. Ry. Co.*, 150 Ind. 498: "But, even though the instruction in question, as formulated, upon any view, could be said to be a correct exposition ³⁹ of the law, which at least may be asserted as doubtful, still it may be said that it is so framed as to present the question to the jury as an abstract proposition, and not in a manner applicable to the particular evidence in this case. To say the least, it certainly would have left the jury in doubt or uncertainty as to how it should be applied to the evidence in this case, and for this reason alone the court was justified in refusing to give it. An instruction is not only required to state correct legal principles, but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane."

In any view of the case, the giving of the instructions quoted was erroneous. Therefore, the court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded with instructions to sustain the defendant's motion for a new trial. The clerk is directed to issue the proper order for the return of the prisoner.

STATUTES—EX POST FACTO LAWS—PUNISHMENT.—No statute which modifies the rigor of the criminal law is regarded as an ex post facto law: *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572, and monographic note thereto, on ex post facto laws.

INSTRUCTIONS—APPLICABILITY—SELF-DEFENSE.—An instruction which has no application to the case as made by the evidence should not be given to the jury: *Maurv v. State*, 68 Miss. 605, 24 Am. St. Rep. 291. The law of self-defense, when invoked by proof, should be given to the jury plainly, directly, connectedly, affirmatively, and in such a manner as to show its applicability to the facts in evidence: *Tillery v. State*, 24 Tex. App. 251, 5 Am. St. Rep. 882.

PUGH v. HIGHLEY.

[152 INDIANA, 252.]

EXECUTION SALE—SECRET EQUITIES.—A JUDGMENT CREDITOR, who buys land in good faith, at an execution sale on his own judgment, takes the title thereto clear of any prior secret equities of which he had no notice.

Moon & Wolf, for the appellant.

R. T. St. John and W. H. Charles, for the appellees.

²⁵² **BAKER, J.** Suit to foreclose vendor's lien. Appellees conveyed lands to one Clayborn Highley and took his unsecured note therefor. Afterward, appellant recovered judgment against the grantee and caused execution to issue. The sheriff levied on the lands in question. At the sale, appellant was the purchaser. When the time for redemption expired, she received a sheriff's deed for the lands.

Complaint in two paragraphs. The first is silent concerning notice to appellant of appellees' equity. The second charges that appellant had notice before receiving the sheriff's deed. Appellant's several demurrers for want of facts were overruled. A demurrer was sustained to an answer of appellant's, in which she averred that she bid at the sale, paid the costs, and receipted the sheriff for the full amount of her judgment, without knowledge or notice of appellees' claim. Judgment for appellees after trial on issues completed by answers of general denial and payment and reply denying payment.

The question is, Does a judgment creditor, who in good faith buys at a proper execution sale on his own valid judgment, take the land subject to prior secret equities?

²⁵³ The lien of a judgment attaches only to the actual interest of the debtor in the land. While the judgment remains unexecuted, the lien may be subordinated to any prior equity, though secret; for the creditor pays or surrenders nothing to or for the debtor, and continues to hold against the debtor his full claim, which the court has merely changed from a cause of action into a judgment.

A security for an antecedent debt will be upheld between the parties; but the taker will not be protected against prior secret equities, because he parts with nothing. But a purchaser who pays the owner the value of the land takes the title clear of equities of which he has no notice.

And a creditor who, without notice, cancels a pre-existing debt in consideration of his debtor's conveying him land is a good faith purchaser for value. To hold that the debtor may sell his land to a stranger and turn over the purchase price (money, notes, goods, land) to his creditor in satisfaction of the debt, whereby the creditor is free from claimants of secret equities, and to hold that the creditor, if the debtor conveys the land to him in payment of the debt, is liable to be affected by secret equities, is to approve the roundabout and involved, and to condemn the straight and simple, method of accomplishing the same result—using the land to pay the debt.

A good faith purchaser, other than the judgment creditor, at a proper execution sale on a valid judgment, who pays the sheriff the amount of his bid, acquires all the right, title, and interest in the land sold (except redemption) that the judgment debtor could have conveyed to him by deed of bargain and sale. As to secret equities, he stands on the same footing with the good faith purchaser for value from the apparent owner of land. In both cases, the purchaser irrevocably parts with his money, relying and having the right to rely on getting not merely what the debtor actually owns, but what from the public records he apparently owns. In either case—before the debtor conveys, or before the ²⁵⁴ sheriff conveys for him—the holder of the prior secret equity has had it in his power to prevent anyone's being misled by the false situation. If either the subsequent purchaser or the holder of the secret equity must suffer or be postponed, it should be the latter, since his initiative made delusion by the debtor's apparent circumstances possible.

What, now, is the position of the judgment creditor who purchases at a proper execution sale on his own valid judgment? (The premises exclude the question of the effect upon the judgment creditor of irregularities in the proceedings.) The authorities holding that he is not a good faith purchaser for value seem to be based upon either or both of two propositions: that he has parted with nothing—has not changed his position for the worse; and that he will not be permitted to

urge a claim that rises higher than the source of his right (by that, meaning the lien of his judgment).

The judgment creditor purchaser has parted with value, and has changed his position for the worse. He has paid to the sheriff the amount of his bid in cash, actually or constructively; for, if he merely receipts for payment of his judgment in whole or in part, the transaction in contemplation of law is the same as if he had paid the sheriff in cash and the sheriff had paid him in cash. His payment is just as irrevocable as that of a stranger purchaser. His right to vacate the satisfaction of the judgment is no greater than that of a stranger purchaser. (And under section 765 of the Revised Statutes of 1881, section 777 of Burns' Revised Statutes of 1894, and section 765 of Horner's Revised Statutes of 1897, there can be no right of that kind in the present case, for defects in the proceedings and want of title in the debtor are excluded from the question, by the facts.) If the judgment creditor purchaser does not pay at the time of the sale, he is liable to judgment for the amount of the bid, and damages, interest and costs, like any other purchaser: Rev. Stats. 1881, sec. 760; Burns' Rev. Stats. 1894, sec. 772; Horner's Rev. Stats. 1897, sec. 760.

He has also changed his position for the worse, if he is not to be permitted to hold under the execution sale the same as a ²⁵⁵ stranger purchaser. The debtor may have directed the sheriff to levy upon the very land that was subject to the secret equity. Manifestly, the judgment creditor without notice is ethically as innocent in bidding as is the stranger. By the sale, the execution becomes functus officio and the judgment creditor has lost the lien of his execution upon the goods and chattels of his debtor. By the sale, the judgment is satisfied pro tanto and the judgment creditor has lost the lien of his judgment upon the other lands of his debtor.

But, it is said, he may not urge a claim of higher value than the source of his right, that is, his judgment lien. Why not?

If an innocent stranger pays for a deed, he acquires the apparent title of the grantor, and the holder of the secret equity will not be heard to say aught against it. That is, the purchaser gets more than the debtor had. Stronger than the innocent stranger's, however, are the equities of the judgment creditor purchaser without notice. For the holder of the secret equity has less opportunity to protect himself against the stranger than he has against the judgment creditor, since

he may have no means of ascertaining, even by the exercise of the highest vigilance, to whom his secret trustee is about to convey, but it is only his own inaction that can prevent his learning of the judgment before sale—in time to subordinate the lien to his rights. Shall equity offer a premium for sloth? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

If an owner of an antecedent debt cancels in good faith the obligation in consideration of a deed from his debtor, he takes the title free from secret equities. That is, the purchaser gets more than the debtor had. Shall the private, maybe secret, extinguishment of the debt be held of more exalted worth in equity than the law's public and open satisfaction thereof? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

If a stranger without notice buys at execution sale, his ²⁵⁶ purchase cuts off secret claims against the land. That is, the purchaser gets more than the debtor had. The law does not prohibit, but, on the contrary, encourages the judgment creditor to bid; for it is in the interest of the law's execution of the judgment and to the advantage of the debtor that he should compete with the other bidders. If a stranger purchases, the sheriff pays over the money to the judgment creditor, who thereby receives satisfaction out of property on which his judgment may not have been actually a lien. Shall equity accredit the circuitous, and discredit the direct, means to the same end? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

It is a misapprehension to say that the rights of a judgment creditor purchaser arise from the judgment lien, and therefore continue subject to prior secret equities. His position as purchaser is in no sort of legal privity with his position as judgment creditor. When the sale is made, he ceases to be a judgment creditor. His rights thenceforward are those of a purchaser at execution sale. The contention that the rights of a purchaser at execution sale are one thing if he is a stranger and another if he is the judgment creditor is untenable in reason.

The decisions of this court, upon analysis, are found in conformity with these principles. In *Catherwood v. Watson*, 65 Ind. 576, the facts were these: Daniel Watson bought land with his wife's money and took title in his own name. Subsequently, Catherwood obtained judgment against one Mills on which Daniel became replevin bail. The land was sold on exe-

cution to satisfy the judgment and Catherwood purchased. Mrs. Watson sued to quiet title. Catherwood had no notice of her claim till after the execution sale. It was held that Catherwood was entitled to the land clear of Mrs. Watson's secret equity.

It appears in *Rooker v. Rooker*, 75 Ind. 571, that Samuel Rooker used money of his wife in buying land and took title ²⁵⁷ in his own name. His wife had instructed him to buy the land for their daughter Mary. Samuel recognized the trust and made a will devising the land to Mary. In Samuel's lifetime the Farmers' Friend Manufacturing Company recovered judgment against Samuel and bought the land at execution sale on its judgment. The company had no notice of Mary's equities. Within the year of redemption, the company sold its certificate of sale to James Rooker, who knew about the claims of Mary. After James received a sheriff's deed the guardian of Mary, her father having died in the meantime, brought suit to quiet title. It was decided that the company was a good faith purchaser for value, and that, the rights of the parties having been fixed by the execution sale, James' knowledge of Mary's equities at the time he bought the certificate was immaterial.

In *Milner v. Hyland*, 77 Ind. 458, Hyland bought realty with his wife's money and took title in his own name. Milner and others recovered judgments against Hyland on which executions were issued and levied on the land. Milner became purchaser at the sheriff's sale, which was made in part to satisfy Milner's own judgment. By the decision, Milner was fully protected against the secret equity of Mrs. Hyland.

In *Vitito v. Hamilton*, 86 Ind. 137, a mortgage was made to appellee, in which the land intended to be encumbered was not described. The same landowner later executed a mortgage to appellant, in which the same mistake occurred. Appellant brought suit against the mortgagor to reform and foreclose. Appellee was not a party. At the sale, appellant was the purchaser, without notice of appellee's equity. Subsequently, appellee brought suit to reform and foreclose, but appellant was not a party. At the sale, appellee was the purchaser. Held, that appellant's purchase at his own sale cut off appellee's prior secret equity.

In the ejectment case of *Pierce v. Spear*, 94 Ind. 127, the title resulting from an execution sale at which the judgment

258 creditor was the purchaser was determined to be the paramount one.

Decisions to the same effect in other jurisdictions abound: *Tennant v. Watson*, 58 Ark. 252; *Newman v. Davis*, 24 Fed. Rep. 609; *Foorman v. Wallace*, 75 Cal. 552; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517; *Butterfield v. Walsh*, 21 Iowa, 99, 89 Am. Dec. 557; *Walker v. Elston*, 21 Iowa, 529; *Ettenheimer v. Northgraves*, 75 Iowa, 28; *Parker v. Prescott*, 87 Me. 444; *Woodward v. Sartwell*, 129 Mass. 210; *Luton v. Sharp*, 94 Mich. 202; *Adams v. Buchanan*, 49 Mo. 64; *Condit v. Wilson*, 36 N. J. Eq. 370; *Voorhis v. Westervelt*, 43 N. J. Eq. 644, 3 Am. St. Rep. 315; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Wood v. Morehouse*, 45 N. Y. 368, 376; *Barto v. Tompkins Co. Nat. Bank*, 15 Hun, 11; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Sternberger v. Ragland*, 57 Ohio St. 148; *Grace v. Wade*, 45 Tex. 529; *Reynolds v. Haskins*, 68 Vt. 426; *Bayley v. Greenleaf*, 7 Wheat. 46. The decisions in Arkansas, Florida, Illinois, New Jersey, and Texas apparently are controlled by statutes ranking judgment creditors with subsequent purchasers for value.

The cases of *Gifford v. Bennett*, 75 Ind. 528, *Wert v. Naylor*, 93 Ind. 431, and *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497, holding that stranger purchasers at execution sales and cancelers of antecedent debts, without notice, are innocent purchasers, are also authoritative in principle. The statements in *Boling v. Howell*, 93 Ind. 329, *Petry v. Ambroscher*, 100 Ind. 510, *Tarkington v. Purvis*, 128 Ind. 182, and *Orb v. Coapstick*, 136 Ind. 313, in so far as they may be deemed to affirm that the holder of an antecedent debt who cancels his claim for a conveyance of land from his debtor takes subject to secret equities of which he had no notice are disapproved.

259 Against the decisions in which was directly involved the very question that arises in the present appeal, no authority to the contrary in this state has been cited, nor has an extended investigation discovered one. There are, however, several instances of obiter dicta.

In *Rooker v. Rooker*, 75 Ind. 571, and *Vitito v. Hamilton*, 86 Ind. 137, the expressions of dissent, by force of the term, are excluded from the decisions.

In *Carnahan v. Yerkes*, 87 Ind. 62, 67, the following language was used: "An execution creditor who bids off property at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a bona fide or innocent purchaser." The statement is incomplete, because silent as to notice. Applied to a judgment creditor purchaser with notice of the prior equity, it is right; to one without notice, wrong. The facts in the case disclose that the judgment creditor purchaser had notice, prior to the execution sale, of the senior rights of his adversary. The quotation must be limited, or regarded as dictum.

In *Shirk v. Thomas*, 121 Ind. 147, 153, 16 Am. St. Rep. 381, it was said: "*Rooker v. Rooker*, 75 Ind. 571, *Gifford v. Bennett*, 75 Ind. 528, *Vitito v. Hamilton*, 86 Ind. 137, . . . have, indeed, been overruled and must be regarded as without force. . . . The great weight of authority, evidenced by our own well considered cases, . . . is that a judgment creditor who buys at his own sale obtains only the interest which the judgment debtor had in the property at the time the judgment was entered."

The facts were these: Albert Tyner, on August 1, 1884, owned certain land. That day he deeded it to James Tyner. The deed was recorded in May, 1885. On December 6, 1884, James Tyner, for full value, deeded the land to Shirk's ancestor. This deed was recorded February 18, 1885. Shirk's ancestor went into possession under his deed, and Shirk was in possession at the time of the sale under Thomas' judgment. On October 28, 1884, Thomas caused a writ of ²⁶⁰ attachment to issue against Albert Tyner on the ground of his non-residency. The writ was levied on the land in question. January 8, 1885, Thomas recovered judgment in attachment. July 7, 1886, order of sale was issued. July 31, 1886, sale occurred and Thomas bought. Neither James Tyner nor Shirk's ancestor nor Shirk had any notice of the attachment proceedings. The deed from Albert Tyner had been on record fourteen months, and Shirk and his ancestor had been in possession of the land nineteen months, before Thomas purchased at the execution sale.

When it was determined that the rights of Thomas as holder of a judgment in attachment were no greater than those of the holder of an ordinary judgment, and were therefore subordinate to prior equities, the case was ended. Thomas could not be an innocent purchaser at any sort of a sale that occurred

more than a year after he had notice of the prior deeds. The quoted proposition is pure dictum.

Nor does one of the seventeen cases cited in *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, as supportive of the dictum, uphold it. In *White v. Wilson*, 6 Blackf. 448, 39 Am. Dec. 437, a misdescription in a mortgage was corrected against judgment creditors, not against purchasers at execution sale. In *Glidewell v. Spaugh*, 26 Ind. 319, the right of a purchaser at execution sale was held inferior to the right of one in possession under an unrecorded deed at the time of the sale. Possession was notice. In *Watkins v. Jones*, 28 Ind. 12, the controversy was between a wife who sought to enforce a secret trust against her husband and a judgment creditor of the husband. No question concerning rights under execution sales was involved. Nor did the question arise in *Troost v. Davis*, 31 Ind. 34, wherein the holder of a prior equity sought to enjoin an execution sale. In *Hampson v. Fall*, 64 Ind. 382, Fall sent money to his mother with which to buy land for him. She took title in her own name, and subsequently mortgaged the land to one Vawter, who knew of the trust. Vawter, for value, transferred the mortgage to Hampson, who got a deed through foreclosure. ²⁶¹ Hampson had no notice of Fall's equity. Hampson's title was held to be paramount. There was no sheriff's sale in *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562. The holder of a prior equitable lien enjoined a judgment creditor from proceeding to execution sale on his judgment. In *Jones v. Rhoads*, 74 Ind. 510, it appears that Castor devised his lands to Daniel Rhoads, a stranger. The heirs of Castor brought an action to set aside the will. A compromise was made, under which the court entered judgment that the will was valid, the heirs quitclaimed to Daniel, and Daniel gave his notes secured by mortgage on the devised lands to Jones as trustee of the heirs for the full value of the lands. Jones, as trustee, later got a deed through foreclosure. Before the notes and mortgage were executed, Patton had recovered against Daniel Rhoads a judgment, on which Jacob Rhoads became replevin bail. After the foreclosure sale, Jacob paid Patton, caused execution to issue, and bought at the sale. Jacob was not a party to the foreclosure proceedings. On Jones' suit to quiet title, Jacob prevailed because the judgment lien attached to the land before the mortgage lien did. In *Sharpe v. Davis*, 76 Ind. 17, an ineffectual effort was made to hold, by virtue of a sheriff's deed, land to which the title never was in the judg-

ment debtor and for which the defendant had a recorded deed before the execution sale occurred. The same dictum appears in the opinion, however. Judgment creditors in *Boyd v. Anderson*, 102 Ind. 217, failed to prevent the reformation of a prior deed made by the judgment debtor. In *Heberd v. Wines*, 105 Ind. 237, a wife quieted her equitable title against a judgment creditor of her husband who held the legal title in trust for her. *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593, was a case of collusion between husband and wife to defraud the husband's creditors, and the rights of purchasers at execution sale were in no way involved. In *Miller v. Noble*, 86 Ind. 527, Miller, at his own execution sale on judgment against the widow of John Noble, purchased land that the widow took under the statute. She had married again before ²⁶² the judgment was rendered. After her death, during coverture, the Noble children recovered the land from Miller. The case presents no question of secret equities. *Hays v. Reger*, 102 Ind. 524, concerned solely the subjection of a judgment lien to a prior equity. In *Foltz v. Wert*, 103 Ind. 404, the purchaser at execution sale had constructive notice, and his assignee both constructive and actual notice, of the prior equities. *Wright v. Tichenor*, 104 Ind. 185, decides that a sale upon a judgment against the husband alone does not convey the interest of the wife. The case does not pertain in the least to the relation between purchasers at execution sale and holders of prior secret equities. In *Wright v. Jones*, 105 Ind. 17, creditors of a widower unsuccessfully sought to subject one-third of his deceased wife's land in fee to the liens of their judgments in spite of her will to the contrary made in pursuance of an agreement between the husband and wife. *Taylor v. Duesterberg*, 109 Ind. 165, was a suit by a creditor of a husband to set aside as fraudulent a deed to his wife. No question arose that related to rights under execution sales.

The statement in *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, that the cases of *Rooker v. Rooker*, 75 Ind. 571, *Gifford v. Bennett*, 75 Ind. 528, and *Vitito v. Hamilton*, 86 Ind. 137, have been overruled is wholly gratuitous. They enunciate principles that are founded in reason; they are not opposed by any decision in this state on the same or similar facts; they flow with the current of modern authority; and they certainly are not overborne by the dissent in the *Rooker* and *Vitito* cases, nor by the obiter dicta in *Sharpe v. Davis*, 76 Ind. 17,

Carnahan v. Yerkes, 87 Ind. 62, and Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.

Judgment reversed, with instructions to sustain the demurrer to each paragraph of complaint.

EXECUTION SALES.—A JUDGMENT CREDITOR who purchases at a sale under his own judgment is regarded as a purchaser in good faith, and takes the property free of all equities, and defects in the title, of which he had no notice: Note to Lusk v. Reel, 51 Am. St. Rep. 36.

UDELL v. CITIZENS' STREET RAILROAD COMPANY.

[152 INDIANA, 507.]

APPEAL—INSUFFICIENT ASSIGNMENT OF ERROR—SPECIAL VERDICT.—A mere objection "to the filing of the defendant's request for a special verdict" is an insufficient assignment of error on appeal, for it does not properly present any question for the determination of the court.

TRIAL—GENERAL VERDICT—PRACTICE.—A party who considers himself entitled to a general verdict should ask for it at the right time and in the proper manner.

TRIAL—SPECIAL VERDICT—VENIRE DE NOVO—PRACTICE.—A party who is dissatisfied with a special verdict should ask the court to set it aside, and award a venire de novo.

RAILROADS—STREET RAILWAYS—WHO IS NOT A PASSENGER—TRESPASSERS.—A boy eight and one-half years old, riding on an open electric street-car, having wooden strips or slats placed on one side of it to prevent the ingress or egress of passengers, is not a passenger thereon, to whom the railway company owes the duty of safe carriage and immunity from injury, where he is in a place not intended for passengers; where he is not received as a passenger; where his presence is not known to the company's employés; where he does not conduct himself as a passenger; where he has not paid any fare, though he intends to do so, if called upon; and where the company's employés are not required to search for trespassers before starting the car. Hence, if he, being unable to get into the car, on account of its crowded condition, hangs on to the slatted side of it, and on the outside thereof, in a stooped and dangerous position, with his feet on the boxing of the axle, and holding on to a portion of a seat with his hands; but, being unable to continue his hold, falls off, and is injured, before reaching his destination, by the car running over him, he must be considered a trespasser and not a passenger, though the company's employés might have seen him, if they had examined that part of the car.

RAILROADS—STREET RAILWAYS—PASSENGER—READINESS TO PAY FARE.—The circumstance that a boy, who is riding on an electric street-car by hanging on to the outside thereof, has a nickel in his pocket with which to pay his fare, when called upon, does not make him a passenger.

STATUTES—AMENDATORY ACT—SUBJECT IS EXPRESSED IN TITLE, WHEN.—An act amending a practice act and providing for special verdicts has its subject sufficiently expressed by a title which purports to amend a designated section of "an act concerning proceedings in civil cases."

STATUTES—VALIDITY.—ACQUIESCENCE IN THE CONSTITUTIONALITY of a statute for over forty-five years by the courts of a state is a circumstance of some weight in determining the question of the validity of a similar statute.

STATUTES—PROVISION FOR SPECIAL VERDICTS—CONSTITUTIONALITY—TRIAL BY JURY.—A statute amending a practice act, and providing for special verdicts, is not unconstitutional, as violating the right of trial by jury.

TRIAL—REFUSAL OF INTERROGATORIES TO JURY.—If the interrogatories submitted to a jury cover every material question of fact in the case, there is no error in refusing certain other interrogatories prepared and tendered by plaintiff's counsel, especially where they call for mere opinions, conclusions of law, or evidentiary facts.

INSTRUCTIONS.—IF A SPECIAL VERDICT IS REQUESTED, no instructions are proper, except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, and who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein. It is not necessary or proper to give general instructions as to the law of the case.

William V. Rooker, for the appellant.

W. H. H. Miller and John B. Elam, for the appellee.

508 DOWLING, J. Action for damages for a personal injury sustained by the infant appellant. There were two trials of the cause in the Marion superior court, the first resulting in a disagreement of the jury. On the second trial, upon the request of appellee in writing, made before the introduction of any evidence, the court, agreeably to the requirements of the act of 1895, directed the jury to return a special verdict. Such special verdict was prepared by counsel on either side of the cause, was submitted to the court for revision, and was in the form of interrogatories properly framed. The court gave to the jury only such general instructions concerning their duties as are suitable where a special verdict is requested, and refused to give certain special instructions tendered on behalf of appellant.

509 On the return of the special verdict, appellant moved for judgment in his favor upon it, which motion was overruled. He also filed a motion for a new trial, and the court overruled it. Judgment was thereupon rendered for appellee on its motion. Exceptions to these rulings were saved by appellant.

The errors discussed by appellant's counsel in their briefs, and orally, are the ruling of the court on appellant's objection to appellee's request for a special verdict, the rulings on the

motions for judgment on the special verdict, and the decision of the court on the motion for a new trial.

The first of these errors is not available to appellant for the reason that no question touching the same is properly presented for the determination of the court. The appellee having filed its request for a special verdict, appellant filed his objection to it in these words (title omitted): "The plaintiff objects to the filing of the defendant's request for a special verdict herein, for the reason that the same is filed pursuant to the act of March 11, 1895, concerning proceedings in civil cases, which act is unconstitutional and void, for the reason that it deprives the plaintiff of the right of trial by jury upon the issues as joined in the complaint and answer, and requires the jury to take from the court, and not from the pleadings, the questions to be decided by the jury."

It will be observed that the objection was only to "the filing of the defendant's request for a special verdict." No demand was made, either before the introduction of the evidence, or afterward, that the jury be directed to bring in a general verdict.

On the return of the special verdict no objection was made to it by appellant, nor was there at that time a request that the jury be sent back with instructions to make a general verdict. No motion was made for a venire de novo. If counsel for appellant thought they were entitled to a general verdict, they should have asked for it at the right time, and in the proper manner. If they thought the verdict returned by the jury was not the proper one, or ⁵¹⁰ that it was imperfect, they should have asked the court to set it aside, and award a venire de novo: *Bosseker v. Cramer*, 18 Ind. 44; *Tidd's Practice*, 922; *Smith v. Jeffries*, 25 Ind. 376; *Elliott's Gen. Practice*, sec. 935, and cases cited. The question as to the validity of the special verdict, however, is properly presented under the motion for a new trial and is considered in another part of this opinion. Did the court err in overruling appellant's motion for judgment on the special verdict, and in rendering judgment thereon in favor of appellee?

The special verdict shows that appellant, at the time of the accident, was a boy aged about eight years and seven months, of average size, strength, and intelligence, residing with his parents on Udell street in the city of Indianapolis, three-fourths of one mile from the public resort known as Armstrong Park. The appellee was the owner of, and was operat-

ing an electric railroad for the transportation of passengers, in the city of Indianapolis, and in North Indianapolis, in Marion county, Indiana. On June 26, 1892, appellee stopped the train, consisting of a motor-car and a trailer, both being open, or summer, cars, with tops supported by posts, at Armstrong Park, for the purpose of receiving passengers. A long step, or foot-board, ran along these cars on the right-hand side (when looking toward the front end), by means of which passengers entered upon the platform or floors of said cars. The cars were provided with seats running across from side to side, upon each of which five persons could be seated. On the left-hand side of the cars there was no step, or other means of entrance, and wooden strips or slats extended from end to end on such left-hand side to prevent the ingress or egress of passengers. These slats were so adjusted that they could be raised or lowered to admit or discharge passengers on that side of the car. No passengers were received by appellee on the left-hand side of its cars at the park on the day mentioned, nor did appellee invite passengers to enter its cars on that side. Appellant, who was at Armstrong Park, got ⁵¹¹ upon the forward part of the trailer car, on the left-hand side thereof, placing his feet on the boxing of the axle, and holding on to a portion of a seat with his hands. He neither paid any fare, nor offered to do so, nor was he asked for his fare by any employé of appellee. He had a nickel in his pocket with which he could have paid such fare, and he intended to do so, if asked for it. He rode in the place described, in a stooping position, on the outside of the car, for about three-fourths of a mile, and until he arrived at Udell street, where he intended to get off. Here he was unable to retain his hold and fell off, and was run over by the wheels of the trailer. The right leg, and the toes of the left foot, were so crushed as to require amputation. After the train started, appellant exercised reasonable care, under the circumstances, to avoid being hurt. He could not have gotten off with safety from the time the train started until he fell, nor could he draw himself into the car, or release his hold, for the purpose of stopping it. The cars ran through from Armstrong Park to Udell street without stop. None of the employés of appellee saw the appellant when the train was in the act of starting, or while he was hanging on the outside of the trailer after the train was under way, although they might have seen him if they had made an examination of that side of the car. No such examination was made. The place

where appellant was riding was not a proper one, and was very dangerous. The car on which appellant rode was crowded with passengers, many of whom stood on the foot-board or step, and on the floors of the cars. The position of some of these was such as to render it difficult for the employes of the appellee to see appellant. Some of these passengers were near to appellant, while he was hanging on the outside of the car, and, if he had wished to do so, he could have touched them, or spoken to them, thereby making them aware of his presence, or asking them to stop the car. He did neither. When appellant came to the car at the park, there was no room for him to get upon it as a passenger. A bystander told appellant to go ⁵¹² around to the left-hand side of the car and get on, and he acted on this suggestion. When the car left the park, the seats, the aisles between the seats, the platforms, and the foot or running boards, were full of passengers. Before the day of the accident, appellant had been warned against hanging on the outside of street cars, and riding there. He did not know that he had no right to do so, or that it was a dangerous place to ride. In the usual way of collecting fares upon the car on which appellant was riding, the conductor could have seen appellant, and appellant knew this. Appellant intended to pay his fare when called upon. When the passengers were entering the car at Armstrong Park, the conductor and motorman were temporarily absent from it, and took no part in assisting passengers to get on, or in seating them. When appellant got upon the boxing of the axle at Armstrong Park he did not comprehend the danger of his position, but afterward became aware of it. While appellant was standing upon the boxing of the axle, and hanging on the side of the car, the train was run at the rate of eighteen or twenty miles per hour. Appellant first attempted to get on appellee's cars as a passenger, from the platform at the east entrance of Armstrong Park, but was unable to do so on account of the crowd of persons on the cars. Appellee's servants in charge of the train could have stopped it after leaving Armstrong Park, and before reaching Udell street, if they had been asked to do so.

Upon a careful review of these facts, giving to the conduct of the appellant the most favorable construction, we do not think that they sustain the proposition that appellant was a passenger upon the appellee's cars, to whom appellee owed the duty of safe carriage and immunity from injury. Appellant was not in a place intended for passengers. He was not re-

ceived as a passenger. His presence on the car was not made known to appellee's agents and servants. He did not conduct himself as a passenger. Appellee's servants were not required to search for trespassers before starting the cars, and ⁵¹³ appellee was not bound to discover appellant and remove him from the perilous situation in which he had voluntarily placed himself. The distressing consequences of the act of appellant, in standing on the outside of the car on the iron boxing of the axle, cannot be said to be the result of any act or omission of appellee or its employes. The circumstance that appellant had a nickel in his pocket with which to pay his fare—when called upon—did not make him a passenger. If he did not intend to pay his fare unless called upon, and left the car, or attempted to leave it, without paying such fare, that fact of itself would be entitled to weight in determining the question of his right on the car. It is shown by the special verdict that, although the train was run at a high rate of speed from Armstrong Park to Udell street, appellant was able to maintain his hold, and did not fall off until he arrived at, or very near, his destination, and that the rate of speed of the cars when approaching Udell street was generally reduced. As the special verdict fails to show that appellant was a passenger, the rules concerning the overloading of street-cars, and the duty of street-car companies to passengers, stated in *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167, 48 Am. St. Rep. 717, and the cases there cited, do not apply. The fact that appellant was a child, aged eight years and seven months, did not make him any less a trespasser, if the other facts found compel the conclusion that he was wrongfully upon the car. If, after an ineffectual attempt to get on the car at a proper and usual place, he abandoned that intention and became a trespasser, he lost the right to that measure of care and protection which a carrier of passengers is required to extend to one who seeks to be carried as a passenger.

The theory of both paragraphs of the complaint is that appellant was a passenger on appellee's car. The special finding does not sustain this theory. On the contrary, the only conclusion which can be drawn from the facts found is that appellant was wrongfully upon the car, in an improper, ⁵¹⁴ unusual, and dangerous place; that he was not known to be there by appellee's employes in charge of the train; and that the consequent injury was due to his voluntary exposure of himself to evident peril.

We find no error, therefore, in the action of the court in overruling appellant's motion for judgment on the special verdict, and in rendering judgment for appellee.

The constitutionality of the act of March 11, 1895, amending the practice act, and providing for special verdicts, is called in question, and a decision upon it is involved in the refusal of the trial court to give the special instructions tendered by appellant.

Two points are made in support of this objection: 1. That the subject of the act is not expressed in the title; and 2. That the act violates the right of trial by jury.

The title is as follows, "An act to amend section 389 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881."

The act so amended is entitled, "An act concerning proceedings in civil cases."

That the title of the act of March 11, 1895, sufficiently complies with the requirement of the constitution has been frequently decided by the courts of this state. Like decisions have been made by the courts of Louisiana, from the constitution of which state this provision is said to have been borrowed: Greencastle etc. Co. v. State, 28 Ind. 382; Walker v. Caldwell, 4 La. Ann. 297; Duverge v. Salter, 5 La. Ann. 94; Blakemore v. Dolan, 50 Ind. 194.

It is said in Greencastle etc. Co. v. State, 28 Ind. 382, that: "Since the decision in Walker v. Caldwell, 4 La. Ann. 297, the legislature of Louisiana, with a few exceptions, has adopted the following formula: "Be it enacted, et cetera, that section—of an act entitled, et cetera—be amended and re-enacted so as to read as follows."

⁵¹⁵ A formula substantially like this was adopted by the general assembly of the state of Indiana, at least as early as March 2, 1853, and the same has been used by every legislature in this state since that date. There is nothing in the first point.

Does the act of March 11, 1895, violate the right of trial by jury? In our opinion, it does not. Except as to their form, the act of March 11, 1895, did not change the law governing special verdicts as it had existed in this state since 1852. The Civil Code of 1852 required the court, at the request of either party, to direct the jury to give a special verdict in writing upon all, or any, of the issues; and, in all cases, when requested by either party to instruct them, if they rendered a general ver-

diet, to find specially upon particular questions of fact to be stated in writing: 2 Rev. Stats. 1852, sec. 336, p. 114.

This provision continued in force until the enactment of March 11, 1895. Its validity was not questioned. Acquiescence in the constitutionality of this statute for so long a period by the courts of this state is a circumstance of some weight in determining the question of the validity of a similar statute.

Independently of this consideration, however, we are unable to perceive that the statute under examination in any way invades the province of the jury, or deprives the citizens of this state of any common-law right connected with a trial by jury to which, under the constitution, they are entitled.

In civil actions, under the constitution of this state, the jury never possessed the right to decide questions of law. Their inquiries have always been confined to matters of fact. The scope of such inquiries is not abridged by the act of March 11, 1895. The argument of counsel, founded upon the distinction between primary facts and inferences or conclusions from facts, is unsound. If an inference or conclusion from a fact, or facts, is itself a fact proper to be found by the jury, it may be made the subject of an interrogatory. ⁵¹⁶ But, if the proposed inference or conclusion from a fact or facts is not itself a fact, but a conclusion or inference of law, then the jury has no right to find such conclusion or inference. The statute in question authorized either party to submit to the jury every essential question of fact, together with every proper inference or conclusion of fact. If parties to actions did not avail themselves of this privilege, it was not because of any defect or prohibition in the law.

We have examined *Railroad Co. v. Stout*, 17 Wall. 657; *Patterson v. Wallace*, 1 H. L. Cas. 748; *Mangam v. Brooklyn etc. Ry. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Detroit etc. Ry. Co. v. Van Steinburg*, 17 Mich. 99; *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426; *Baltimore etc. R. R. Co. v. Walborn*, 127 Ind. 142; *Mann v. Belt R. R. etc. Co.*, 128 Ind. 138; *Cincinnati etc. Ry. Co. v. Grames*, 136 Ind. 39, cited by counsel for appellant, and find nothing in them inconsistent with the views expressed in this opinion.

If the jury is required to find any conclusion of law in answer to an interrogatory, such finding must be disregarded: *Louisville etc. Ry. Co. v. Miller*, 141 Ind. 533, 544; *Roller v. Kling*, 150 Ind. 159; *Weaver v. Apple*, 147 Ind. 304.

Appellant complains of the refusal of the trial court to submit to the jury certain interrogatories prepared and tendered on his behalf. The act regulating special verdicts expressly authorized the court to change and modify the interrogatories prepared by counsel. One hundred and forty-four interrogatories were submitted to, and answered by, the jury. They covered every material question of fact in the case. Many of those tendered by appellant's counsel called for mere opinions, for conclusions of law, and for facts which were evidentiary, and the court did right in excluding them.

It is further objected that the court erred in refusing to give special instructions numbered from 1 to 6, tendered by appellant's counsel. It is sufficient to say that where a special verdict is requested no instructions are proper, except ⁵¹⁷ such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein: *Roller v. Kling*, 150 Ind. 159.

The court gave to the jury all instructions necessary to enable them to understand their duties concerning the special verdict, and the facts to be found therein. It was neither necessary nor proper for it to give general instructions as to the law of the case: *Roller v. Kling*, 150 Ind. 159, and cases cited.

The motion for a new trial was properly overruled. Finding no error in the record, the judgment is affirmed.

APPEAL—INDEFINITE ASSIGNMENT OF ERROR.—An appellate court will decline to consider an uncertain and indefinite assignment of error. It should specify the particular error complained of: *National Fertilizer Co. v. Holland*, 107 Ala. 412, 54 Am. St. Rep. 101; *Klotz v. James*, 96 Iowa, 1, 59 Am. St. Rep. 348.

RAILROADS—STREET RAILWAYS—PASSENGERS—WHO ARE NOT.—One who is not known to be on a railroad train, and who rides in a place not intended for passengers, especially where it is one of danger, is not a passenger: See monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 77, 78, on passengers, who are, and when they become such. The actual payment of fare is not essential to the status of a passenger, and it is the duty of street railway companies to prevent children entering their cars, except under proper safeguards, and they are answerable for their negligence, whether the children are passengers or not: Note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 85, 97.

STATUTES—AMENDATORY ACTS—EXPRESSION OF SUBJECT IN TITLE.—The title of an amendatory act is sufficient if it indicates the act to be amended and its subject matter: See mono-

graphic note to *Bobel v. People*, 64 Am. St. Rep. 78, on the sufficiency of the title to a statute.

INSTRUCTIONS—SPECIAL VERDICT.—General instructions as to the law of the case are not proper where the jury has been required to return a special verdict: *Louisville etc. Ry. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883.

AMERICAN TRUST AND SAVINGS BANK v. McGETTIGAN.

[152 INDIANA, 582.]

RECEIVERS—ACTION BY, TO CANCEL MORTGAGE—PLEADING—DEMURRER, EFFECT OF.—In an action by a receiver to cancel a mortgage on the trust property, a demurrer to the complaint calls in question not only the sufficiency of the facts to constitute a cause of action, but also the right of the plaintiff to maintain the suit.

RECEIVERS—PRE-EXISTING LIENS—ENFORCEMENT OF.—When a court takes possession of the property of an insolvent corporation, and appoints a receiver, it holds the property impressed with all existing rights and equities of creditors, and the relative rank of claims and the standing of liens remain unaffected by the receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it.

RECEIVERS—DUTY OF, TO PROTECT PREFERENCES AND PRIORITIES.—It is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities, as it is to make a just distribution among the general creditors.

PLEADING—JOINDER OF PARTIES—DEMURRER.—When several persons join in an action, the complaint must show a good cause of action in all, or it is insufficient on demurrer for want of facts.

MORTGAGE FOR ADEQUATE CONSIDERATION—VALIDITY OF, AS AGAINST EXISTING CREDITORS.—A mortgage given by a corporation to secure bonds issued by it is valid, as against existing creditors, even though accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law, where it appears that the security given was for an adequate consideration received.

RECEIVERS—ACTION BY, TO CANCEL MORTGAGE, NOT MAINTAINABLE, WHEN.—A receiver cannot maintain an action to cancel a mortgage on the trust property, where his complaint shows, upon its face, that the relief sought will place creditors who have an equity in a worse condition, and creditors who have no equity in a better condition, than they occupied before his appointment.

RECEIVERS—ACTION BY, TO CANCEL MORTGAGE—CONFLICTING EQUITIES—PROPER PROCEDURE.—If a receiver brings an action to cancel an alleged fraudulent mortgage on the debtor's property, but his complaint shows facts indicating a controversy among the creditors as to equities in such property, which controversy cannot be fully adjudicated in the absence of the creditors holding the conflicting equities, the case presented is one of distribution, and the best course to pursue for a speedy settlement of such equities is not for the court to authorize a cross-action to foreclose the mortgage, but to order its receiver to sell the alleged mortgage property, free from liens of every character, under an order that all liens and claims be transferred to the fund.

McBride & Denny, D. P. Baldwin, Mason & Latta, and Blackledge & Thornton, for the appellants.

Ayres & Jones, Miller, Winter & Elam, and Elliott & Elliott, for the appellee.

582 HADLEY, J. This suit was commenced by John E. McGettigan, receiver of the Premier Steel Company of Indianapolis, against the American Trust & Savings Bank of Chicago and the Bank of Commerce of Indianapolis, as trustees of a certain bond issue of said steel company, Henry E. Southwell et al., to cancel the mortgage given by the Premier Steel Company to secure bonds issued by it to the amount of three hundred thousand dollars. The substance of the complaint, after 583 certain formal allegations, is as follows: That the plaintiff was duly appointed the receiver of the Premier Steel Company by the Marion circuit court, and was by order of court authorized to bring this suit to test the validity of this mortgage; that on the seventh day of July, 1891, by a resolution of the board of directors, the president and secretary of the Premier Steel Company were directed to execute three hundred bonds, of one thousand dollars each, secured by mortgage on the property of the company, and to dispose of them to the best advantage; that the bonds, bearing date August 1, 1891, and a mortgage to secure the same, were signed by the president and secretary, covering the property of the company, which is described in the complaint; that said officers were not authorized by said company to pledge said bonds as collateral security for loans; that the bonds and mortgage were signed by the president and secretary (a copy of said mortgage being filed as a part of the complaint, as exhibit "A"), but the bonds were not sold or disposed of in any way, and the company thereafter held itself out as being possessed of the property free from encumbrance, and procured large loans and credits upon the strength of such representations; that on the thirteenth day of July, 1892, being then insolvent, and largely indebted for loans and credits obtained as aforesaid, all of which was at the time well known to defendant Southwell, and being at the time indebted to Southwell in the sum of twenty thousand dollars upon two notes dated December 21, 1891, for ten thousand dollars each, payable one year after date, and having obtained from Southwell an additional loan of thirty thousand dollars upon three notes of ten thousand dollars each, dated July 13, 1892, payable one year after date, all of said notes

being indorsed by Charles W. DePauw, president, and W. H. Coen, secretary and general manager, of said company, there-upon said general manager and said Southwell executed the agreement of that date, which is made a part of the complaint, and which is in the following words: "This memorandum of agreement, made this thirteenth day of July, A. D. 1892, between the Premier Steel Company ⁵⁸⁴ of Indianapolis, Indiana, and H. E. Southwell of Chicago, Illinois, witnesseth: Whereas, H. E. Southwell is now the holder and owner of five certain notes of the Premier Steel Company, for ten thousand dollars each, payable to the order of C. W. DePauw, and by him indorsed, payable one year after date, two of said notes being dated December 21, 1891, and three being dated July 13, 1892; and whereas, the Premier Steel Company has deposited, with the American Trust & Savings Bank of Chicago, three hundred of its six per cent gold bonds, of one thousand dollars each, payable twenty years after date, secured by a mortgage deed on the property of said Premier Steel Company, dated August 1, 1891, in escrow; now, it is hereby agreed between the parties hereto that said bank shall continue to hold said bonds and said mortgage deed, which deed has not been filed of record, upon the following understanding, to wit: That, whenever the owner of said notes shall feel himself insecure in regard to the same, then, upon his request, said bank shall file said trust deed for record, notice of said request to be given previously to said Premier Steel Company; otherwise, said bonds and trust deed to remain as at present until the payment of said notes. It is further agreed that if, at any time before the expiration of the aforesaid notes, said Premier Steel Company shall desire a further loan of fifty thousand dollars, and said Southwell shall not be able to furnish said amount, then the said trust deed shall be filed of record, and two hundred thousand dollars of said bonds shall be released to said steel company, the other one hundred thousand dollars remaining as security for the aforesaid notes. Witness our hand and seals the day and year above written. Premier Steel Company, by W. H. Coen, Sec'y & Gen'l Man'g'r. H. E. Southwell."

It is then averred that such secretary and general manager had no sufficient authority from said company to execute said agreement; that at the time said Southwell well knew that said company was insolvent, or in danger of insolvency; that said company was largely in debt, and intended and expected to buy large quantities of material upon credit, and ⁵⁸⁵ to borrow

large sums of money, and incur large debts, to carry on its business and construct new and additional buildings, et cetera, all of which improvements to said property were by its terms to be covered by said mortgage; that, knowing that the business of said company was largely carried on upon credit, and that to record the mortgage would injure the credit of the company and prevent it from obtaining credit, and knowing that it was obtaining and was intending to obtain credit by holding out to the world that its property was free from encumbrance, said Southwell fraudulently agreed with said company to withhold said mortgage from the record for the purpose of permitting said Premier Steel Company fraudulently to hold itself out as being possessed of said property free of encumbrance; that thereafter said company contracted large debts, borrowed large sums of money, and obtained materials and property upon credit, upon such representations that its property was free from encumbrance, and that such credits and property could not have been obtained otherwise, and that a very large part of the indebtedness of said company now existing, to wit, more than one hundred thousand dollars, is for loans and credits and property obtained after said agreement was made, and while the mortgage was so fraudulently withheld from the record; that the same was so fraudulently withheld until the twenty-ninth day of April, 1893, a few days prior to the appointment of said receiver, when said Southwell caused said mortgage to be placed on record; that said bonds have never been sold or in any way disposed of, except to place the same in the American Trust & Savings Bank aforesaid as security for said loans so made from Southwell; that within a day or two before this receiver was appointed, said Charles W. DePauw, knowing that the receiver was about to be appointed, took possession of two hundred thousand dollars of the bonds, and still retains possession thereof, claiming that he is entitled to them for the benefit of the creditors of the company upon whose paper he is indorser, and that he has made a voluntary assignment to the Union Trust Company ⁵⁸⁶ of Indianapolis; that said mortgage is an apparent lien upon said real estate, and casts a cloud upon the title of the plaintiff; that said Southwell claims that he has and holds a lien upon said real estate prior and superior to that of the plaintiff, and of the creditors aforesaid who gave credit to said Premier Steel Company upon the understanding that the property was free from encumbrance; that said Premier Steel Company is insolvent; that said Southwell ought not to

be permitted to hold said mortgage as a lien prior to the rights of the creditors of said company who gave credit to said company upon the faith that said property was unencumbered as aforesaid; and that the said Charles W. DePauw and the Union Trust Company have no rights to or interest in said bonds. Prayer, that the mortgage be adjudged void and canceled; and that the title of the plaintiff to the property be quieted as against any claim of the defendants, and for all other proper relief.

The separate demurrers of the American Trust & Savings Bank and the Bank of Commerce, trustees, and Henry E. Southwell, to the complaint, were overruled. Answers to the complaint were filed, but, as no question is presented to this court upon them, they need not be noticed. The trustees filed a cross-complaint, in which they joined in asking a foreclosure of the mortgage. To the cross-complaint, the receiver filed his separate answer, in five paragraphs. The first paragraph of answer covers substantially the same ground as the complaint. The second and third paragraphs present substantially the same facts pleaded in estoppel. The trustees filed demurrers to each the first, second, and third paragraphs of this answer. These demurrers were overruled.

The demurrers of appellants to the complaint call in question not only the sufficiency of the facts to constitute a cause of action, but also the right of the plaintiff to maintain the suit: *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257; *Farris v. Jones*, 112 Ind. 498.

587 The first assault made upon the complaint is that the plaintiff cannot maintain this suit on behalf of all the creditors, as he shows by his complaint one class of creditors that has no right or equity that can be asserted against the mortgage. It is well established that when a court takes possession of the property of an insolvent corporation, and appoints a receiver, such receiver "is the arm of the court," by which it administers the trust for the benefit of the creditors. But the court receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims, and the standing of liens remains unaffected by a receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it: *Gluck and Becker on Receivers*, sec. 6; 20 Am. & Eng. Ency. of Law, 407; *Wعرishoffer v. North River etc. Co.*, 99 N. Y. 398-402; *Hubbard v. Hamilton Bank*, 7 Met. 340; *Minchin v. Second Nat.*

Bank, 36 N. J. Eq. 436; Snow v. Winslow, 54 Iowa, 200; Hale v. Frost, 99 U. S. 389. And it is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities as it is to make a just distribution among the general creditors. He is strictly the officer of the court, and it is his duty so to conduct the business that the interests of all persons shall be protected. He should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim: Gluck and Becker on Receivers, secs. 28, 48; First Nat. Bank etc. v. Barnum etc. Works, 58 Mich. 315, 317; Attorney General v. Security Life Ins. Co., 79 N. Y. 267, 271. It is true, as asserted by counsel for appellants, that the right of the receiver to bring this action depends upon the right of the creditors represented by him to have united in bringing it, if no receiver had been appointed. The complaint and argument by appellee proceed upon the assumption that ~~588~~ the appellee, in bringing it, was acting on behalf of all the creditors to set aside a fraudulent mortgage. In him all the creditors unite. His complaint is their joint complaint, in which they seek to have the mortgage adjudged absolutely void. They do not ask the court to recognize superior equities in the junior creditors, and for postponement of the mortgage to such equities, but insist that, upon the facts pleaded, the mortgage should be canceled and entirely swept away, and be held of no force and effect whatever as against or in favor of any one. If the complaint shows that the creditors could not join in such a complaint, it is bad.

It is a familiar rule of pleading that, when several persons join in an action, the complaint must show a good cause of action in all, or it is insufficient on demurrer for want of facts: Brown v. Critchell, 110 Ind. 31, 35; Brumfield v. Drook, 101 Ind. 190, 197; Parker v. Small, 58 Ind. 349, 352; Maple v. Beach 43 Ind. 51, 59.

We do not doubt the receiver's right to maintain an action to set aside a mortgage when the facts pleaded by him show the mortgage to be void, or show it to be voidable at the suit of all the creditors. This court has so held (National State Bank v. Nat. Bank, 141 Ind. 352, 50 Am. St. Rep. 330), and we are satisfied that the rule is correctly stated in that case. But this complaint does not present such a case. It is alleged that the Premier Steel Company, being "insolvent and largely indebted,"

entered into the agreement of July 13, 1892. Being "insolvent and largely indebted" implies that the steel company had existing creditors when the agreement of July 13th was executed. It also affirmatively appears that Southwell became a creditor for fifty thousand dollars at the time of the agreement, and received from the company a preference it had the undoubted right to give.

It is shown that the security given was for an adequate consideration received—that Southwell contributed to the estate of the debtor as much as he took away—and it is not shown how the transaction in any way injured the previous creditors, or could operate to defraud them. The ⁵⁸⁹ mortgage was valid, as against existing creditors, even though accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law: *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 281, 36 Am. St. Rep. 537. A receiver, while acting for a court of conscience, must act impartially, and may not sequester the security of one creditor for the benefit of others who have no equity. The only persons, if any, injured by the alleged fraud, were the subsequent creditors without notice; and the receiver cannot maintain an action that shows upon the face of it that the relief sought will place the creditors having an equity in a worse condition, and the creditors having no equity in a better condition, than they occupied before his appointment.

The complaint presents facts indicating a controversy among the creditors as to equities in the debtor's property. Its averments are not that the contract giving Southwell a security was fraudulent, or for any reason invalid, as against prior creditors, but that the agreement to withhold the mortgage from record was fraudulent against those who became creditors on the faith that the property was unencumbered. It discloses a controversy that cannot be fully adjudicated in the absence of the creditors holding conflicting equities. The case presented is one of distribution, to which all the creditors should be made parties, and permitted to implead each other, and have their equities defined. Equity seeks the administration of insolvent estates by the shortest and cheapest methods available, and, holding the estate in custodia legis, a court of equity will not clothe its receiver with authority to sue, or permit a creditor to sue, and involve the trust property in litigation, and expose the estate to costs and attorney's fees, if there is open any other complete remedy, less expensive, and more comprehensive in its subjects. In

application of this principle, it becomes obvious that the courts below should not have authorized the cross-complainants to institute their cross-action to foreclose the mortgage. ⁵⁹⁰ It goes but halfway. In it no equities can be adjudicated but those of parties. General creditors are not, and cannot be made, parties, unless possibly upon their own application. It may entail upon the estate heavy expenditures for costs. It implies a dispossession of the receiver, and sale by the sheriff; and it seems clear, in the interest of an economical administration of the trust, and a speedy settlement thereof, the court should order its receiver to sell the alleged mortgaged property free from liens of every character, under an order that all liens and claims should be transferred to the fund. This is but the exercise of a well-recognized equitable power, and will bring all the creditors, all the beneficiaries of the fund, to a contest in its distribution, with ample opportunity to implead each other, and receive a full and complete adjudication of their equities.

The conclusion we have reached makes it unnecessary to review the alleged subsequent errors. The judgment is reversed, with instructions to sustain appellants' demurrers to the complaint, without leave to amend, and to order a dismissal of the consolidated cross-complaint, and for further proceedings in accordance with this opinion.

Dowling, J., was absent.

FRAUDULENT CONVEYANCES—CONSIDERATION.—A third party may, even with a knowledge of the failing circumstances of a debtor, buy property of him upon a fair consideration actually paid, unless he is aware that the debtor intended by the sale to defraud his creditors: Note to State v. Mason, 34 Am. St. Rep. 396.

The Relation of Receivers to Pre-existing Liens, and the Remedies for Their Enforcement.*

Nature of Receiver's Possession.—The object of appointing a receiver is to preserve the property for the benefit of all parties interested, and this object is sometimes best attained by continuing a business, which will be done where the interests of all parties will be best preserved by doing so: Knickerbocker v. McKindley Coal etc. Co., 172 Ill. 535, 64 Am. St. Rep. 54. This is particularly true of the railroad business: See monographic note to Green v. Coast Line R.

***REFERENCE TO MONOGRAPHIC NOTES.**

Appointment and powers of receiver in creditors' suit to avoid fraudulent conveyance: 57 Am. Dec. 450-453.

Receiver, when and over what property will be appointed: 64 Am. Dec. 482-495.

Power of courts to compel payment of subscriptions, and levy and payment of assessments, at instance of creditors of insolvent corporations: 100 Am. Dec. 552-557.

Execution against property in hands of receiver: 2 Am. St. Rep. 403, 404.

Claims which take precedence over mortgages of railway and like property: 54 Am. St. Rep. 400-403.

R. Co., 54 Am. St. Rep. 400-433, on claims which take precedence over mortgages of railway and like property. A receiver has been defined as an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rents, issues, and profits, and apply or dispose of them at the direction of the court, when it does not seem reasonable that either party should hold them: See monographic note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 482, on when and over what property a receiver will be appointed. The custody of a receiver is the custody of the court; in other words, the custody is that of the law, and is exclusive alike of both parties to the suit. He simply holds the property for those ultimately entitled to it: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, and note; *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 48 Am. St. Rep. 558; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486. A receiver of property appointed by a court is not an agent, except of the court appointing him: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 48 Am. St. Rep. 558; *Brown v. Warner*, 78 Tex. 543, 22 Am. St. Rep. 67. He is merely a ministerial officer of the court: *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481; a quasi trustee, holding the fund for the benefit of whoever may eventually establish title thereto: *King v. Goodwin*, 130 Ill. 102, 17 Am. St. Rep. 277. He represents creditors as well as judgment debtors. He is a trustee for all parties, and is bound to apply the effects of the debtor faithfully to the payment of the debts: *Note to Porter v. Williams*, 59 Am. Dec. 525.

Effect of Appointing a Receiver.—The title to property is not changed by the appointment of a receiver: *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481; *Chase's Case*, 1 Bland, 206, 17 Am. Dec. 277. A receiver takes the property subject to existing liens and equities, and his exclusive possession thereof does not interfere with, or disturb, any pre-existing liens, preferences, or priorities. It simply holds the property intact until the relative rights of all parties can be determined, and prevents the sacrifice of assets by a multiplicity of suits and executions: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837; *Bates v. Wiggin*, 37 Kan. 44, 1 Am. St. Rep. 234; *Chicago Title and Trust Co. v. Smith*, 158 Ill. 417; *Lorch v. Aultman*, 75 Ind. 162; *Hoffman v. Schoyer*, 143 Ill. 598, 37 Ill. App. 455; *Becker v. Torrance*, 31 N. Y. 631, 641; *Talladega Mercantile Co. v. Jenifer Iron Co.*, 102 Ala. 259; *Ward v. Healy*, 114 Cal. 191; *Rogers etc. Hardware Co. v. Cleveland Bldg. Co.*, 132 Mo. 442, 53 Am. St. Rep. 494; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478. So the discharge of the receiver, and return of the property to the owner, leaves the property subject to any claim or charge legally resting upon it; and this may be enforced, through appropriate process, by any court having jurisdiction: *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60. The appointment of a receiver does not determine any right: *Ellicott v. Warford*, 4 Md. 80; and it does not abate any personal

action pending against the debtor: *Wilder v. New Orleans*, 87 Fed. Rep. 843; *Allen v. Olympia etc. Power Co.*, 13 Wash. 307. As to such an action, the receiver has no status in court until made a party thereto on his own application, and the plaintiff has a right to proceed to final judgment without him: *Wilder v. New Orleans*, 87 Fed. Rep. 843. But, while the appointment of a receiver is not a bar to suits brought against a corporation before the bill for the appointment of a receiver is filed, and while the suits will not abate in consequence of such appointment, the receiver may appear in, and defend, the suits, if the interests represented by him render it proper or necessary to do so: *Kittredge v. Osgood*, 161 Mass. 384; for the appointment of a receiver, by a court of competent jurisdiction, secures to that court the power to control, at its discretion, all controversies which affect the property placed in his custody as such receiver: *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414. The power to appoint a receiver under an assignment for the benefit of creditors is not only subject to all rights paramount to the assignment, but it is also subject to legal conditions: *First Nat. Bank v. Barnum Wire Works*, 58 Mich. 315, 317.

Recovery of Assets.—It is the duty of a receiver to secure all the assets available for the payment of creditors: *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835; *Eversmann v. Schmidt*, 53 Ohio St. 174, 53 Am. St. Rep. 632; and the receiver of a corporation may, with the permission of the court, do anything which the corporation might lawfully have done to make the most out of its assets: *Pacific Ry. Co. v. Wade*, 91 Cal. 449, 25 Am. St. Rep. 201. As each creditor of a corporation may sue, the right is equal in all, and the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit, as to all claims not in suit at the time of his appointment: *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835. A foreign receiver has authority only coextensive with the court appointing him, when the right of precedence or priority of creditors is asserted in respect to property or funds of a nonresident debtor, which the receiver has not reduced to possession: *Catlin v. Wilcox etc. Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338. One claiming a right to hold the possession of property as collateral security for money loaned must turn it over to a receiver, when required by court to do so, or suffer the consequences of contempt: *Ex parte Tinsley*, 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818. A receiver may recover stock subscriptions: *State v. Union Stock Yards*, 103 Iowa, 549; *Cole v. Satsop R. R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858; monographic note to *Germantown etc. Ry. Co. v. Fitler*, 100 Am. Dec. 554, on the power of courts to compel the payment of subscriptions, and levy and payment of assessments, at the instance of creditors of insolvent corporations; and circuit courts of the United States have jurisdiction of actions by the receivers of national banks to collect assessments made by the comptroller, without regard to the amount involved: *Brown v. Smith*, 88 Fed. Rep. 565. A receiver of one state

may, by comity, sue in another: *Cagill v. Wooldridge*, 8 Baxt. 580, 35 Am. Rep. 716; *Whitman v. Mast*, 11 Wash. 318, 48 Am. St. Rep. 874; *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363; *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298. A receiver may maintain suits to set aside fraudulent conveyances made by the debtor: *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790; *National State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330; notes to *Porter v. Williams*, 59 Am. Dec. 525; *Chautauque Co. Bank v. White*, 57 Am. Dec. 451; and a receiver appointed in proceedings supplemental to execution may sue to compel an accounting: *Armstrong v. McLean*, 153 N. Y. 490; or to avoid fraudulent transfers: *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790. A receiver has no right to take property from the possession of a stranger to the action; and an order directing him to take specific property does not justify him in taking it from one claiming title paramount to that of the parties to the action: *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192; but the court has power to proceed, in a summary way, to require the delivery of property to the receiver. This practice is well stated in *Miles v. New South etc. Loan Assn.*, 95 Fed. Rep. 919, 921.

Suits Against Receivers.—There seems to be a preponderance of authority in favor of the proposition that a receiver cannot be sued without leave of the court which appointed him: *Glover v. Thayer*, 101 Ga. 824; but the authorities on the question are divided: See *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593; *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63; and extended note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 316, discussing the question. Suing a receiver, it has been held, without leave of court, only raises a question of contempt, and does not affect the right involved in the suit: *Chautauque Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347. But one thing is clear. The possession of a receiver must not be disturbed, except by permission of the court, by persons having adverse, though paramount liens: *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400. Property in the actual or constructive possession of a receiver is in custodia legis, and cannot be interfered with without leave of court: *Pelletier v. Greenville Lumber Co.*, 123 N. O. 596, 68 Am. St. Rep. 837. A receiver's possession will be protected by the court: *Albany City Bank v. Schermerhorn*, 9 Paige, 372, 38 Am. Dec. 551; *Meredith etc. Sav. Bank v. Simpson*, 22 Kan. 293; and it is the duty of the court to do so, not only against violence, but against suits at law: *In re Day*, 34 Wis. 638. It may, therefore, forbid any interference, by way of levy or seizure, with the property in the possession of the receiver: *Woerishoffer v. North River etc. Co.*, 99 N. Y. 398. A creditor cannot maintain an action against a bank after its effects have been placed in a receiver's hands: *Leathers v. Shipbuilders' Bank*, 40 Me. 386. Neither a court of equity nor a receiver appointed by it is exempt from the operation of the statute of limitations: *Laidley v. Smith*, 32 W. Va. 387, 25 Am. St. Rep. 825; and, where a receiver holds the property of a cor-

poration for the benefit of all its creditors, the statute of limitations does not run in his favor against claims not barred at the time of his appointment, so long as the trust is open and continuing, and has not been repudiated or denied: *Ludington v. Thompson*, 153 N. Y. 499.

Conflict of Jurisdiction.—No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court granting the receiver, and is not open to revision by it, if the court had jurisdiction of the subject matter and the parties. Such a judgment, however, merely establishes the existence and extent of the claim; the manner in which it shall be paid is under the control of the court which appointed the receiver: *Gay v. Brierfield etc. Iron Co.*, 94 Ala. 303, 33 Am. St. Rep. 122; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753. Where receivers of a railway have been appointed by a federal court, a judgment for a debt due from them, recovered in a state court, can be satisfied only by an application to the court appointing the receivers for an order directing its payment in the due order of the settlement of the affairs of the railway company: *Irwin v. McKechnie*, 58 Minn. 145, 49 Am. St. Rep. 495. If a bill is filed having for its object the appointment of a receiver to take into custody the property of the defendant and to pay and discharge all his liabilities therefrom, the jurisdiction of the court at once attaches to such property, so that no interference with it on the part of other courts will be allowed: *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84. If a state court appoints a receiver for the property of an insolvent bank, such appointment does not prevent a federal court from entertaining a suit to set aside conveyances to the bank, as being void, as against the grantor's judgment creditors. Neither would the receiver's sale of the property so conveyed, made after such suit is brought, and the possession by the state court of the proceeds of such sale, defeat the jurisdiction of the federal court over the respective rights of such creditors and the bank, although it might affect the nature and extent of the remedy: *Bacon v. Harris*, 62 Fed. Rep. 99, 101. In some states, personal property capable of manual delivery can only be levied on by the officer taking actual possession of it; and such property, of a judgment debtor, in the hands of a garnishee, not being in custodia legis, by virtue of writs of execution issued by a state court, there can be no conflict of jurisdiction because of a suit in equity to determine the rights of all parties asserting claims to such property, commenced in a federal court, after the return day of such writs, especially where no facts are alleged from which even an inference can be drawn that the property is, or has been, in custodia legis, or subject to any lien by virtue of legal proceedings: *Chase v. Cannon*, 47 Fed. Rep. 674. That an action may be brought against receivers appointed by a federal court, in any state court having jurisdiction of the subject matter, without asking leave of the court which appointed them: See *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Erb v.*

Popritz, 59 Kan. 264, 68 Am. St. Rep. 362; Grant v. Buckner, 172 U. S. 232, 238; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, and note; Fordyce v. Dixon, 70 Tex. 694; Central Trust Co. v. East Tennessee etc. Ry. Co., 59 Fed. Rep. 523; Hollifield v. Wrightsville etc. R. R. Co., 99 Ga. 365. It must be observed, however, that the right to sue a receiver appointed by a federal court without leave of the court appointing him is granted by an act of Congress, which dispenses with such leave: See 25 U. S. Stats., c. 866, sec. 3, p. 436; Ball v. Mabry, 91 Ga. 781, 783. But the question of the receiver's right or authority to hold or manage the property in his possession, or any part thereof, cannot be raised by such a suit. Hence, the receiver of a corporation, appointed by a federal court, cannot, without leave of that court, be sued in a state court in an action the purpose of which is to take from his hands or control property belonging to the corporation or held by it under a claim of ownership at the time the receiver took possession: Hollifield v. Wrightville etc. R. R. Co., 99 Ga. 365. Neither will a federal court permit property held by it for the benefit of creditors and lienors to be subjected to the jurisdiction of a state court, and to possible dismemberment. Thus, a suit was instituted in a federal court against a railroad company for the purpose of marshaling liens and bringing its property to a sale. The property, consisting chiefly of an unfinished roadbed, was put into the possession of a receiver. Pending such suit, application was made to the federal court for leave to make the receiver a party to a suit in a state court, instituted under a state statute, for the purpose of condemning and appropriating a part of the roadbed, but the application was denied, on the ground that it was the duty of the court to protect the property in its charge, and the court directed that the proceedings for a sale should be hastened, in order that the rights of all parties might be preserved: Hayes v. Columbus etc. Co., 67 Fed. Rep. 630. An action of trespass cannot be maintained in a state court against a receiver appointed, pendente lite, by a federal court, merely for the purpose of foreclosing mortgages on the corporate property of a railway company: Decker v. Gardner, 124 N. Y. 334.

Remedies of Creditors.—It is a receiver's duty, as far as possible, to see that each creditor has an equal opportunity to enforce his claim against the fund or property in the receiver's hands: In re People v. Security Life Ins. etc. Co., 79 N. Y. 267, 271; and it is also his duty, where he is receiver for a corporation, to allow all claims which he is satisfied are legal and just, but no claim should be allowed by him which could not have been recovered against the corporation either at law or in equity: Attorney General v. Life etc. Ins. Co., 4 Paige, 224. After the receiver has taken possession, any person claiming the property, or any interest therein, may present his claim to the court. He may be made a party defendant to the suit in order to establish his claim. Or he may petition to have it heard before a master. Or he may, by express permission of the court, bring a suit for the possession, care being taken to protect

the receiver. But the receiver will not be ordered to deliver the property to a claimant until his right is established, in one of these modes: *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486. A creditor of an insolvent debtor may, by attachment or execution, acquire a specific lien upon property, which will give him a preference over unsecured creditors, on a bill in equity subsequently filed, but, after the jurisdiction of equity over the assets has once attached, it is exclusive, and no creditor, ordinarily, can then pursue a legal remedy in such a way as to acquire a preference: *Roseboom v. Whittaker*, 132 Ill. 81.

A claimant, or lienor, who seeks relief in equity against receivers, should, in accordance with the more commonly recognized practice, proceed by a petition, application, or motion in the cause in which the receivers were appointed: *Porter v. Kingman*, 126 Mass. 141; *Rockwell v. Portland Sav. Bank*, 31 Or. 431, 435; *Pacific Ry. Co. v. Wade*, 91 Cal. 449, 25 Am. St. Rep. 201; *Smith v. Effingham*, 2 Beav. 232, 235. Contra, that pre-existing liens may be enforced independently of leave of court, see the well-considered case of *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488; and subdivision, "Divorce," *infra*. Thus, when a judgment creditor of an insolvent corporation, whose lien is superior, not only to the claims of all its other creditors, but even to the original title of the corporation itself, is prejudiced by having a receiver put in his way, his remedy is by a petition and motion in the cause: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837. And where a receiver has been appointed of the property of an insolvent corporation, a general creditor, having a lien thereon, has a right to intervene and contest the validity and priority of other claims or asserted liens: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

If a receiver is appointed by a federal court, in a suit where it has plenary jurisdiction of the subject matter, the court has jurisdiction of the res, and, through the receiver, may take possession of it without regard to whether all claimants are, or are not, before it as parties. If it authorizes the receiver to take possession, the remedy of a stranger to the proceedings, who claims title to a part of the property, is by intervention in the suit before the federal court. He cannot maintain trespass against the receiver, on the ground that he was not made a party to the suit, for the court's order, in such a case, is not void. If one, by intervention in a court of equity, asserts a right to property, of which the court has jurisdiction, he makes himself a party to the suit and cannot prosecute his right in any other forum. It may also be said here that the sequestration of property, the subject matter of a suit in equity, for the purpose of preserving it, in its integrity, pending the making of future orders in reference to it, or pending the suit, is within the inherent jurisdiction of the court. The sequestration is in rem, drawing the property into the custody and control of the court, and binds the property, though there may not be jurisdiction of all the persons having rights or interests in it: *Steele v. Walker*, 115 Ala. 485, 67 Am. St. Rep. 62.

If property in the hands of receivers is claimed by strangers to the suit in which the receivers were appointed, the approved procedure is to file a petition, asking for the court's order on the receivers to deliver the property: *Winchester v. Davis Pyrites Co.*, 67 Fed. Rep. 45. The practice is the same whether the title is claimed by way of mortgage, judgment, or otherwise. A pre-existing lien cannot be enforced against an estate after it has passed into a receiver's hands, without leave of the court. Thus, a party holding a judgment, which is a prior lien upon the property, if desirous of enforcing it against the estate, after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must, the same as a mortgagee, first obtain leave of the court for this purpose. The court will then direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the propriety of the lien, et cetera, and take care that the fund be applied accordingly: *Wiswall v. Sampson*, 14 How. 52, 66. The proper practice for one having a claim against funds in the hands of a receiver is to apply, by petition, to the court appointing the receiver, setting forth his claim, and grounds of complaint, if any. The court will then direct him to be examined, pro interesse suo, before a master, and if, upon auditing his claim, the court finds it to be a just one, it will direct the receiver to pay it without litigation, but if the court finds the claim to be a doubtful one, it will give the claimant leave to prosecute it before some competent court. And the practice is the same whether the claim is or is not a prior lien upon the property in the hands of the receiver: *Kennedy v. Railroad Co.*, 3 Fed. Rep. 97; *Thompson v. Scott*, 4 Dill. 508, 510; *Wiswall v. Sampson*, 14 How. 52, 65.

An objection that a court has no jurisdiction to appoint receivers for any other property of a corporation than that upon which the complaining creditors claim a lien, should be taken in limine, and is waived if not made until after a decree authorizing the receivers to sell all of the corporate property: *Temple v. Glasgow*, 80 Fed. Rep. 441, 444. General creditors of either an individual or a corporation who have no judgment or other liens upon a debtor's property, have no standing in equity to interfere with the debtor's possession of his property: *Temple v. Glasgow*, 80 Fed. Rep. 441, 444. This rule, and the exceptions to it, are fully discussed and explained in *Hollins v. Brierfield etc. Iron Co.*, 150 U. S. 371. But, if a party has obtained judgment in a state court, and has issued execution, without being able to enforce payment thereof, he is entitled, upon return of the execution unsatisfied, to invoke the aid of a court of equity, either state or federal, sitting in the same state, of otherwise competent jurisdiction, for the enforcement of his rights; and, therefore, if the amount involved is sufficient, and the citizenship of the adversary parties is diverse, he may file a bill in a court of the United States for the purpose of attacking conveyances of property, which prevent the levy of an execution in the

Law action: *Bacon v. Harris*, 62 Fed. Rep. 99, 102. And, with respect to satisfying liens, the general rule is, that wherever property, subject to a lien, has been brought within the domain of a court of equity, and a receiver of it is appointed, the rents and profits in the hands of the receiver will be applied, along with the corpus of the fund, to satisfy the lien, after paying charges, such as taxes and insurance: *Shepherd v. Pepper*, 133 U. S. 626, 647; *Taladega Mercantile Co. v. Jenifer Iron Co.*, 102 Ala. 259.

If a creditor, who files a bill to obtain a decree of insolvency, and the appointment of a receiver against a bankrupt corporation wishes to attack the validity of a co-creditor's claim, it should be done upon proceedings had before the receiver on the question of the distribution of assets. An attack of that kind has no place in such a bill, and to make it in that way is improper practice: *Consolidated Coal Co. v. National State Bank*, 55 N. J. Eq. 800, 804. Collusion between the parties to a suit does not deprive an intervenor of his right to appear and be heard, where the court has taken actual possession of property by a receiver, and to have his rights in the property ascertained and awarded to him. Thus, if intervening petitions are filed in a court of equity, asserting liens upon, or interests in, property which the court, in the original suit, placed in the hands of a receiver, the court may retain jurisdiction of such interventions, after it appears that the original suit was collusively brought, and should have been dismissed at its commencement had the facts then been made to appear: *Electrical Supply Co. v. Put-in-Bay Waterworks etc. Co.*, 84 Fed. Rep. 740. A creditor, upon a proper case made by petition, may be permitted to come in and prove his debt at any time while the fund, or any part thereof, is under the control of the court, although the time limited by the master for the creditors to come in and prove their debts has expired: *In re People v. Security Life Ins. etc. Co.*, 79 N. Y. 267, 271. For the application of this rule to claimants having statutory liens against railway property, see note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 413. As a promise to answer for the debt of another is void, unless made upon some new consideration of benefit accruing or moving directly to the promisor, it follows that a promise by a corporation, in consideration that the lienholder will permit property subject to the lien to be sold, and the proceeds to be used in the business of the receivership, to pay such lienholder the amount of his lien, is not enforceable, because no benefit or advantage accrues to the receiver: *Bray v. Parcher*, 80 Wis. 16, 27 Am. St. Rep. 17. The rule of practice which requires all creditors, seeking to enforce their claims against property in the hands of a receiver, to apply for relief by petition to the court in which the receiver is acting, applies to all cases of damages to persons or property, whether occasioned prior or subsequent to the appointment of the receiver, and, by leaving all questions relating to liability of receivers in the hands of the court appointing them, per-

sons having claims against an insolvent corporation or its receiver, are not deprived of a constitutional right of a trial by jury, for it is a fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction: *Pacific Ry. Co. v. Wade*, 91 Cal. 449, 25 Am. St. Rep. 201. If a creditor fails to avail himself of an order of court, which directs the receiver of an insolvent institution to distribute money in his hands as such receiver, the creditor does not thereby acquire a lien upon the remaining assets, such as unpaid dividends, for his pro rata share in such fund. If the order is not obeyed, the remedy of the injured party is by an application to the court which made the order, and not by way of a lien upon the remaining assets: *Rockwell v. Portland Sav. Bank*, 31 Or. 431, 435.

Pre-existing Liens, Generally—Priority.—Jurisdiction to enforce liens is concurrent in law and equity: *Ford v. Sproule*, 2 A. K. Marsh. 528, 12 Am. Dec. 439. Under the code of North Carolina, one who cuts timber and manufactures it into lumber for a corporation, before a receiver is appointed therefor, has the right to retain possession of the lumber until his lien is discharged by payment: *Huntsman v. Linville River Lumber Co.*, 122 N. C. 583, 586. But it must be observed that simple contract creditors have no lien on the property of their debtor. Such creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity, to obtain the seizure of their debtor's property, and its application to the payment of their debts; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state, for the line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. A simple creditor of a corporation does not acquire any lien on its property, nor is any direct trust impressed thereon, by the fact that the corporation is insolvent, or has executed an illegal trust deed, or has failed to collect in full all stock subscriptions. Nor would all taken together have that effect: *Hollins v. Brierfield etc. Iron Co.*, 150 U. S. 371. It follows that where a claimant, a contract creditor, has no lien, the receiver cannot properly be required to pay his claim, until the lienholders have been satisfied; and he must then share pro rata with the general creditors. Otherwise, the payment of the claim would give a preference to such indebtedness over the lienholders, and this is permissible only in a few well-defined cases: *Union etc. Trust Co. v. Southern etc. Motor Road Co.*, 49 Fed. Rep. 267.

The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. In a few specified and limited cases, unsecured claims are entitled to priority over mortgage debts, but it does not follow that a court appointing a receiver acquires power to give such preferences to any general and unsecured claims. It has, ap-

parently, sometimes been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness; and some courts, it seems, have conditioned the appointment of a receiver upon the payment of all unsecured indebtedness in preference to mortgage liens sought to be enforced, but this is destructive of the sacredness of contract obligations, and is not justified by the law: *Central Trust Co. v. Thurman*, 94 Ga. 735. With respect to this limited class of claims, in the case of insolvent corporations, whose estates are in the hands of receivers, McCormick, circuit judge, delivering the opinion of the court, in *Mercantile Trust Co. v. Southern States etc. Timber Co.*, 86 Fed. Rep. 711, says: "There are always, to a greater or less extent, certain claims against such an estate, having sometimes a legal lien, and often only an equitable right of such a high character that the court of administration will not defer their payment until the full administration of the estate, but will require their prompt payment, even if it becomes necessary to expose a portion of the property to sale for that purpose before a final hearing is reached. Of such claims are public taxes, and unpaid charges for labor and material, and the necessary supplies furnished for the preservation or operation of the estate within a reasonable time next before its seizure by the court of equity." And, concerning this limited class of claims against railroad property in the hands of receivers, Lurton, circuit judge, delivering the opinion of the court, says, in *Central Trust Co. v. East Tennessee etc. R. R. Co.*, 80 Fed. Rep. 624, 628: "From these cases it may be deduced that, in respect of railroad mortgages there is an implied agreement that all proper operating expenses of such companies, while under the control of the mortgagors, are to be paid out of current receipts, and that any diversion of such income, by which current operating expenses are left unpaid, is a misappropriation of the income, and upon a proper showing the mortgagees receiving the benefit will be required to reimburse the fund applicable to the payment of these 'debts of the income' to the extent of the diversion. It may further be deduced that, independently of any diversion, the necessary operating expenses of a mortgaged railroad, constituting a first charge upon the income while under the control of the mortgagor, will continue to be a charge upon the income under a receivership, and, if necessary, upon the corpus of the property. This latter equity is supposed to arise from the nature of the public duties resting upon such companies, and upon the necessity of such expenditures in preserving the property as a going concern for the ultimate benefit of the mortgage creditors. The debts entitled to displace contract liens must, in the nature of this latter-mentioned equity, be such as were incurred in the necessary operating expenses, and constitute but a limited class, fairly defined by the cases we have cited. Debts of this class must be such as were created shortly before the receivership, and contracted under circumstances reasonably indicating a reliance upon a proper application of the

current income to their payment." Compare the extended note to *Green v. Coast Line etc. R. R. Co.*, 54 Am. St. Rep. 400-433, wherein this subject is discussed. See, also, *Jones v. Arena Pub. Co.*, 171 Mass. 22. The following illustrations will show that a demand, though not a pre-existing or prior lien, may be allowed as a preferred claim by reason of its superior equity.

Claims against an irrigation company for materials furnished and services performed in the operation of the company's business, and which were essential to its operation, and to the preservation of its property, are preferred on the appointment of a receiver, and upon the ground of a superior equity, over a prior mortgage of the company's property: *Atlantic Trust Co. v. Woodbridge etc. Irr. Co.*, 86 Fed. Rep. 975. Payment of the costs and expenses of a receivership will not be deferred to the payment of pre-existing liens, where the assets are insufficient to pay them and the expenses of the receivership. The compensation of the receiver should be paid from the funds in his hands: *Gallagher v. Gingrich*, 105 Iowa, 237. Unpaid rentals for part of a line of railroad, a lease of which has been adopted by the receiver, should be paid as an operating expense; and, if the receiver cannot obtain money to do so, it is proper for the court, on a final decree, to declare the unpaid rentals to be a first lien on the property, and direct that they shall be paid with interest, as a "preferential lien," out of the proceeds of the sale: *Central Trust Co. v. Continental Trust Co.*, 86 Fed. Rep. 517. So, if the receiver of a corporation pays taxes on the corporate realty, and interest upon a mortgage thereon, he is entitled to a lien therefor, which is superior to that of a second mortgagee, or of execution creditors of the mortgagor: *Dummer v. Smedley*, 110 Mich. 466, 478.

On the other hand, where a bill is filed in equity for the appointment of a receiver to take possession of the property of a corporation and distribute its funds among its creditors, and work has been done in pursuance of a contract with the corporation, made before the filing of the bill, there is no reason why a claim for such work should have priority, when it was not done at the receiver's request, nor for the purpose of "aiding the court either in keeping the business alive or administering the assets of the corporation": *Jones v. Arena Pub. Co.*, 171 Mass. 22, 29. So, a proceeding for the appointment of a receiver for a coal and iron company, which operates a short railroad line in connection with its mines, should not be treated as a railroad receivership, so as to give precedence to claims for supplies furnished in the conduct of the business, a few months previous to the appointment of the receiver. The reason for this is that the essential element of a railroad receivership, the maintenance of the operation of the road for the benefit of the public, is lacking: *Manhattan Trust Co. v. Seattle etc. Iron Co.*, 19 Wash. 493, 508. A claim for attorney's fees should be paid out of the funds in the receiver's hands, though the services of the attorney were rendered subsequently to the appointment of the receiver, if they were for

the benefit of the creditors, and to the interest of the fund brought into court: *Burden etc. Sugar Refining Co. v. Ferris Sugar Mfg. Co.*, 87 Fed. Rep. 810. But the fact that an attorney's services in reducing the claim of a prior lienholder incidentally benefited all subsequent lienholders is no ground of priority, in the absence of any contract of employment by them: *Bound v. South Carolina Ry. Co.*, 51 Fed. Rep. 58. Compare *Ross v. American etc. Ins. Co.*, 56 N. J. Eq. 41.

There can be no difficulty in ascertaining what are prior liens and encumbrances, where all of them are matters of record, and it is the duty of receivers to settle priorities. A bill to settle the validity and priority of claims and encumbrances upon the property of an incorporated company, cannot be maintained by a creditor thereof, after the appointment of receivers. It is the duty of the receivers, in settling priorities, to decide upon the validity of claims against the company: *Smith v. Trenton etc. Falls Co.*, 4 N. J. Eq. 505, 510. If receivers have all the property in their hands, under order of the court, for whomsoever it may be found to belong, and all proceedings are required to be, and are had in the cause, for the purpose of ascertaining the rights of all claimants, and how the property should be decreed to be disposed of or distributed by the receivers, it is not material whether they are technically made parties to every proceeding for establishing rights to the property or not. They are, in effect, parties to all proceedings touching the property in their hands, as, in their nature, the proceedings are in rem. When a question arises as to what property is covered by a first and a second mortgage, as against each other, in a proceeding to foreclose the mortgages, and where the same corporation is trustee in both mortgages, representative bondholders under each mortgage should be permitted to become parties, and properly litigate the question: *Grand Trunk Ry. Co. v. Central Vermont R. R. Co.*, 88 Fed. Rep. 622, 624, 625.

A receiver appointed in a suit to foreclose a mortgage on lands, which mortgage does not expressly cover rents and profits, does not, under a statute authorizing the appointment of a receiver where mortgaged property is in danger of being lost, acquire any right to growing crops, gathered prior to the decree of foreclosure: *Locke v. Klunker*, 123 Cal. 231. If a receiver has been appointed for a company, and the court orders him to perform the company's contracts, creditors to whom money is due upon speculative contracts, partially performed, are not entitled, under such order, to a lien therefor, prior to that of mortgage creditors. The interests of all parties oftentimes will be promoted by going on with contracts partially completed, but this does not change the relations of the secured and unsecured creditors to each other and to the property: *Olyphant v. St. Louis etc. Steel Co.*, 28 Fed. Rep. 729, 732. The question of priority between those holding pre-existing liens on property in the hands of a receiver, may be left open to be settled by another suit, or upon a proceeding taken to distribute the as-

sets obtained by the receiver from a sale made under order of the court: *Kane v. Lodor*, 56 N. J. Eq. 268, 272.

An order of court, authorizing a receiver to borrow a certain sum of money for a continuance of the business in the hands of a receiver, and making the amount a first lien on the assets in the receiver's hands, does not preclude the court from making subsequent similar orders to borrow additional sums, and making them prior liens. Hence, if certain claims were liens on the assets before his appointment, an order authorizing him to make such claims "preferred claims, upon said claimants releasing their mortgages to secure the same," to rank next to those "who may loan the receiver money to carry on the business, and to manufacture the materials on hand," and further authorizes the receiver to borrow a certain sum for that purpose, making it a "prior claim for the articles manufactured and the notes received for the sale thereof," does not preclude the court, after such mortgages are released, from making subsequent orders for the receiver to borrow additional sums, and making such sums liens prior to the liens of such mortgages: *Blythe v. Gibbons*, 141 Ind. 332, 344. If a receiver, appointed by a court, brings a suit in equity therein, against persons who claim to have pre-existing liens on real estate in the receiver's possession by virtue of his trust, to have the rights of such defendants, in respect to such liens, determined, and, if adjudicated in their favor, paid out of the proceeds of a sale of such realty, the court may make an interlocutory order requiring the defendants to release their liens, and setting apart, to be paid into court, out of such proceeds, a sufficient sum to discharge such liens, if they shall be established to be prior in right to the claims of the plaintiff: *De Visser v. Blackstone*, 6 Blatchf. 235. If the claims of general creditors of a corporation have been adjudged to have priority over the claims of bondholders, who are secured by a trust deed, they do not relinquish their priority over the bondholders, by inviting certain other creditors to come in and participate on paying them a percentage, particularly where there was no intention of relinquishing such priority, and the claims of such general creditors would have been paid in full, even if such other creditors had been allowed to participate: *Manhattan Trust Co. v. Seattle etc. Iron Co.*, 19 Wash. 493, 507.

Attachment.—After the appointment of a receiver, the property to which the receivership relates is in the custody of the law, even before he qualifies, so as to exempt it from the levy of an attachment; and such levy can confer no right or lien on the attachment creditor or on those claiming under him: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776; *State v. Ellis*, 45 La. Ann. 1418; *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Chicago etc. Ry. Co. v. Keokuk etc. Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Columbian Book Co. v. De Golyer*, 115 Mass. 67. Though a receiver may not have reduced the funds of the insolvent to his possession, and, though part of them may be in another state, still the title to all of them and the constructive

possession of them, is in him by virtue of his appointment; and a citizen within the jurisdiction of the court appointing him cannot attach the funds in the other state without the sanction of that court, and by so doing, and refusing to dismiss his suit, he is guilty of and may be punished for contempt: *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147. Where, before the dismissal of a suit in which a receiver was appointed, the court assumed the custody of the same property in another suit by appointing another receiver, and confirmed a sale of the property ordered to be made by him, the validity of such sale is not affected by an attachment levied on the property while in the custody of the first receiver, and before the dismissal of the first suit: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776. If a concern, such as a bank, becomes insolvent, and the honest object is to secure an equitable distribution of the assets, it is entirely proper to place the entire estate in the custody of the law; and the fact that an application for a receiver is made at an unusual hour, and that the order is made by a judge in vacation, during which time he cannot legally appoint a receiver, cannot be urged as proof of a fraudulent purpose. Hence, an attachment of the property is not justified on the ground that there has been a fraudulent disposition of it: *Wadsworth v. Laurie*, 164 Ill. 42, 49. A court of equity, asked to proceed as for a contempt against a creditor, who seeks to reach, by attachment or garnishment, debts due to an insolvent debtor from persons residing out of the state, may properly inquire which of the parties has a paramount right or superior equity to such debts: *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917.

The filing of a bill, and the subsequent appointment of a receiver, does not, however, dissolve valid attachments of the property in his hands made before the bill was filed. The receiver takes the property subject to the pre-existing lien of all valid attachments: *Kittredge v. Osgood*, 161 Mass. 384; *Sage v. Heller*, 124 Mass. 213; *Hubbard v. Hamilton Bank*, 7 Met. 340, 346. But the fact that an attachment lien has attached to part of an insolvent's property does not necessarily preclude a receiver from taking possession of the property, or make the receivership injurious to the holder of the lien: *Byrne v. First Nat. Bank*, Tex. Civ. App., Jan., 1899. To the extent that property has been lawfully attached before the filing of a bill for the appointment of a receiver, the liens of the attaching creditors are paramount to the rights of the receiver in the property: *Kittredge v. Osgood*, 161 Mass. 384; *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436, 443. The rights of nonresident attaching creditors are paramount, in the courts of the state, where the attachment is sued out, to those of a receiver who was appointed by the court of another state, and whose appointment antedates the issuance of the writ of attachment: *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338. The refusal of an attaching creditor to release his attachment, upon the appointment of a receiver, will deprive his claim, if presented to the receiver, of all equity,

and the receiver is, under such circumstances, justified in disallowing it: *In re Greeley*, 70 Conn. 494. See subdivisions, *infra*, "Execution," and "Garnishment."

Creditors' Suits.—The filing of a creditor's bill, and the service of process thereon, create a lien on the equitable assets of the judgment debtor, without the issuance of an injunction, or the appointment of a receiver, and no voluntary assignment by the debtor, nor intervening claims of other creditors, can impair the lien thus created; and the lien upon equitable assets acquired by a creditor's bill is not extinguished by the death of the debtor before the appointment of a receiver, but survives against such assets in the hands of the administrator: *King v. Goodwin*, 130 Ill. 102, 17 Am. St. Rep. 277. The appointment of a receiver in a creditor's suit does not of itself effect a transfer of the debtor's real property; that is accomplished by a deed from the debtor: *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347. "A creditors' bill," says Taft, circuit judge, in *Thomas v. Cincinnati etc. Ry. Co.*, 91 Fed. Rep. 202, "is merely an equitable levy and execution, for the benefit of all creditors, secured and unsecured, and the question of priority is to be settled in the same manner as if execution at law had been levied, at precisely the same time, as upon judgments duly rendered, for all claims found by the court to be just"; and, where certain classes of judgments, favored under the statutes of the state, are given priority over mortgage or other liens upon the property in that state, such priorities are to be recognized by the receiver appointed under such creditors' bill, and may be enforced the same as though executions had been levied under the judgments: *Thomas v. Cincinnati etc. Ry. Co.*, 91 Fed. Rep. 202. A court will not permit the plaintiff in a judgment, who has filed a creditor's bill, and obtained a receiver of the defendant's property, to levy an alias execution on personal property covered by the receivership; and such a levy will be set aside on the defendant's application, unless the plaintiff waives his receivership and dismisses his creditor's suit: *Gouverneur v. Warner*, 2 Sand. 624. A creditor's lien on the property of his judgment debtor is not impaired by the subsequent appointment of a receiver. Hence, if, after the lien of a judgment creditor has attached to the property of a judgment debtor, a receiver is appointed for all of the property of the judgment debtor, in a suit brought by his other creditors for themselves, and such other creditors as would come in and make themselves parties to the suit, such judgment creditor is not bound to intervene in the suit in which the receiver is appointed, though he may do so, but has the right, by leave of court, to enforce his lien by an independent bill against the judgment debtor, with the receiver as a party defendant: *Talladega Mercantile Co. v. Jenifer Iron Co.*, 102 Ala. 259. Receivers in creditors' suits are trustees for, and represent creditors as well as the debtor, and may maintain suits to set aside fraudulent conveyances made by the debtor. Such receivers must administer the whole estate coming to their hands, under the direc-

tion of the court, for the benefit of all parties, first discharging those debts which have acquired an equitable preference: *Note to Chautauque County Bank v. White*, 57 Am. Dec. 451, on the appointment and powers of a receiver in a creditors' suit to avoid a fraudulent conveyance. A receiver appointed in proceedings supplemental to execution may sue to avoid fraudulent transfers: *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790; *note to Chautauque County Bank v. White*, 57 Am. Dec. 451.

Divorce.—A receiver, appointed in an action for divorce, takes the husband's property, in any case, subject to all prior liens and encumbrances. The appointment of the receiver does not, therefore, prevent the enforcement of a judgment lien, upon the husband's real estate, by his judgment creditor, whether such lien is prior or subsequent to the lien of the decree for alimony, if it was acquired prior to the appointment of the receiver: *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488, 495. In this case, it was held that the right to enforce pre-existing liens against the husband's property, under such circumstances, could not be made to depend upon the mere volition of the court or judge making the appointment; but that the holders of such liens, who were not parties to the divorce suit, or subject to the jurisdiction of the court in which it was pending, had the right to take any necessary legal proceedings for preserving or enforcing their liens according to their priority; and that it was not necessary for the holder of a pre-existing judgment lien to first apply to the court appointing the receiver for leave before proceeding to sell the husband's real estate under execution: *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488, 496, 500. The same principle was applied to a subordinate lienholder, it being held that the holder of a second lien upon the real estate held by the receiver, though subsequent and subordinate to the lien of the wife's decree for alimony, was entitled to protect and preserve such right as he had, by a sale under execution, subject to the prior lien of the decree, without asking leave of the court to sell; and that leave to sell is not necessary where the sale under execution involves no physical disturbance of the possession of the receiver: *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488, 499.

Equitable Liens.—One who is entitled to an equitable lien upon property does not lose it by the subsequent appointment of a receiver, but may enforce it: *Hoffman v. Schoyer*, 143 Ill. 598, 37 Ill. App. 455; but this applies to cases in which, before the appointment of a receiver, he would, by instituting proper proceedings for the assertion of his lien, be clearly entitled to have it enforced, as where property covered by warehouse receipts has been wrongfully removed from the warehouse and disposed of after the issue of the receipts, and other property is substituted in its place: *Hoffman v. Schoyer*, 143 Ill. 598, 615; or where accounts have been transferred, with notice, prior to the appointment of a receiver, for, as against the receiver, such equitable assignment vests the right to the money derived therefrom in the trustee. The receiver cannot have the

right to take possession of property and hold the same, where the owner of the estate for which he is receiver would have no right to do so. The rule applies that a receiver's possession is subject to all valid and subsisting liens upon the property at the time of his appointment, and does not divest a lien previously acquired in good faith: *Chicago etc. Trust Co. v. Smith*, 158 Ill. 417, 425.

But, in some of the cases, the expression "equitable lien," or "preferential lien," is used where courts have given a preference over mortgage liens to unsecured debts, contracted before the appointment of a receiver, for labor, supplies, materials, and the like, particularly with respect to railroad property. The priority of such claims is discussed at length in the monographic note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 400-432, on claims which take precedence over mortgages of railway and like property; but it must be observed that these claims, except as otherwise provided by statute, are not, strictly speaking, pre-existing liens on property in the hands of a receiver; that the right of priority given to them does not rest upon any lien, legal or equitable; but that such priority rests entirely upon a supposed superior equity: See note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 400-432; *Central Trust Co. v. Thurman*, 94 Ga. 735, 742. Hence, all that is meant by the expression "equitable lien," or "preferential lien," in such cases, is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien: *Hollins v. Brierfield etc. Iron Co.*, 150 U. S. 371, 385. A court of equity will not create a lien upon real estate in favor of a party unless, from the nature of the transaction, rights have sprung up which ought to be held binding upon the specific property: *Dummer v. Smedley*, 110 Mich. 466, 478. If a receiver is appointed for the property of consolidated corporations, the receivership will not be withdrawn from the unencumbered property of one of them to enable a judgment debtor, who joined in the original petition for its distribution among creditors on the ground of insolvency, to seize it because of a supposed "moral equity," and thus defeat the object of the petition: *Grand Trunk Ry. Co. v. Central Vermont R. R. Co.*, 88 Fed. Rep. 622, 625.

No lien upon, or priority in, money in the hands of a receiver of an insolvent bank can be given for funds deposited therein before the insolvency, by a tax collector, county treasurer, or other person, in the absence of proof that the funds so deposited form any part of the money in the hands of the receiver, either in their original or transmuted form, or as a part of the mass of the assets of the bank: *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458; *Spokane County v. Clark*, 61 Fed. Rep. 538; *Spokane County v. First Nat. Bank*, 68 Fed. Rep. 979. In order to impress upon the assets of an insolvent estate, in the hands of a receiver, a lien for trust funds, it must appear either that the identical fund is still among the assets

awaiting distribution, or that the property sought to be subjected to the lien includes such funds or their proceeds: *Rockwell v. Portland Sav. Bank*, 31 Or. 431.

Execution.—Property in the hands of a receiver is not subject to seizure by officers acting under writs of execution, except by leave of court: See extended note to *Walling v. Millér*, 2 Am. St. Rep. 403, on execution against property in the hands of a receiver: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837; *Robinson v. Atlantic etc. Ry. Co.*, 66 Pa. St. 160. Thus, land belonging to an insolvent corporation cannot be sold upon execution, after the appointment and possession of a receiver, without leave of the court, but this will always be granted in proper cases, for a court of equity is not required to retain possession of property when it would be inequitable to do so: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837. A judgment creditor who desires to proceed against the property of a corporation in the hands of a receiver, by the levy of an execution, should apply to the court which appointed the receiver, and ask that the property be discharged out of custody, so that he may proceed against it: *Thompson v. McCleary*, 159 Pa. St. 189. Property in the hands of a receiver, pending litigation, is not subject to levy and sale under execution, without leave of court, until after a final decree is rendered in the cause: *Edwards v. Norton*, 55 Tex. 405. A levy of execution on property in the hands of a receiver may be ordered withdrawn, and the sheriff compelled to answer to the court for contempt in making it: *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518. A sale of real property, in the custody of a receiver in equity, by virtue of an execution on a judgment at law, is void: *Wiswall v. Sampson*, 14 How. 52. And a sale under execution of property in the custody of a receiver, though under a levy made prior to his appointment, is void, unless authorized by the court: *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400.

But the lien of an execution is not destroyed by the appointment of a receiver: *Ward v. Healy*, 114 Cal. 191. Such appointment, however, does require the lienholder to seek the enforcement of his lien only by permission of the court appointing the receiver, if the latter has obtained possession of the property: *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400. If the court which has appointed a receiver for a corporation renders a judgment for the plaintiff in an action to subject land in the hands of the receiver to the lien of plaintiff's executions against the grantor of the corporation, it is within the power of the court to direct, in such judgment, that the sheriff proceed upon the executions to sell the land, and such direction will not be disturbed, in the absence of anything to show that such method of enforcing the lien was prejudicial: *Cass v. Sutherland*, 98 Wis. 551. So, if the levy of an execution has given the sheriff a valid lien, and it is stipulated between him and a receiver that a sufficient amount of the proceeds to satisfy the execution and sheriff's fees shall be held by the receiver subject to the lien of the

levy, such proceeds, if any exist, represent the goods so levied on, and the court may, on motion, order the receiver to pay the judgment: *Hooley v. Gieve*, 7 Abb. N. C. 271.

So with personal property. A lien fastens upon it from the time of the delivery of fieri facias to the sheriff. Hence, under a statute vesting receivers with an estate from the time of their qualifying as receivers, if an execution upon personal property is not only issued and in the hands of the sheriff before the appointment of the receiver, but the levy is actually made before the receiver qualifies and takes possession of the property, the lien of the execution creditor is clearly entitled to priority: *Prentiss etc. Supply Co. v. Whitman etc. Mfg. Co.*, 88 Md. 240. If an execution has become a lien on personal property, and a receiver is afterward appointed, in a proceeding to which the lienholder is not made a party, such appointment and a sale of the property by the receiver do not divest the lien. The right to enforce it, without leave of the court, in an independent proceeding, and while the property is in the hands of the receiver, is suspended, but, after a sale, the lienholder has the right to levy upon and sell the property: *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317.

A receiver may be appointed in proceedings supplementary to execution, although since their inception, the debtor has made a voluntary assignment for the benefit of creditors: *Tomlinson etc. Mfg. Co. v. Shatto*, 34 Fed. Rep. 380. Compare *Chautauque County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442. A proceeding supplementary to execution does not give any right, or create any lien, before the appointment of a receiver, as against other creditors pursuing different remedies, as where they have discovered property subject to execution, and levied upon it: *Becker v. Torrance*, 31 N. Y. 631, 641. Proceedings supplementary to execution are regarded in the light of a creditor's bill, and a judgment creditor is entitled, on the return of an execution unsatisfied, to an order for the examination of the debtor, and to an order forbidding any transfer of his property, and, when such orders have been issued and served, the judgment creditor has a lien on the debtor's equitable assets disclosed: *Tomlinson etc. Mfg. Co. v. Shatto*, 34 Fed. Rep. 380. But, while the commencement of supplemental proceedings, by the service of an order on the judgment debtor, gives the judgment creditor an equitable lien on the assets subsequently discovered, if he proceeds with proper diligence to discover and apply the same to his judgment, the commencement of supplemental proceedings, as against certain third persons alone, and the appointment of a receiver in such proceedings, cannot give the judgment creditor a lien on the assets in the hands of another third person, not made a party thereto: *Billson v. Linderberg*, 68 Minn. 66, 70, 71. A receiver may, for the protection of pre-existing lienholders, as well as others, bring an action, by order of court, to set aside fraudulent transfers of the debtor: *Pender v. Mallett*, 123 N. C. 57; and judgment creditors may bring such suits. Thus, where judgments were recovered and became a

lien on the judgment debtor's real estate, before the appointment of a receiver, a creditor's suit may be maintained by the judgment creditors, on their own account and for their own exclusive benefit, after a receiver has, in proceedings supplementary to execution, been appointed for the debtor's property, to have set aside as fraudulent and declared void, a mortgage previously given by the judgment debtor upon his real estate, and to secure the proceeds of the debtor's property to the satisfaction of their judgments: *Gere v. Dibble*, 17 How. Pr. 31.

A question of considerable importance as to the effect upon the liens of other judgment creditors, where the oldest one proceeds in equity to set aside a prior fraudulent conveyance or assignment, and not only obtains a decree pronouncing it fraudulent and void, but has a receiver appointed, and through the receiver has the real estate sold for the satisfaction of his debts, is presented in *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347. In that case a debtor made a fraudulent assignment of his real estate for the benefit of creditors, and judgments were afterward recovered against him. The creditor who had the first judgment, and who had his execution returned unsatisfied, filed a bill in equity to set aside the assignment and for the satisfaction of his debt. He obtained a decree declaring the assignment void as to creditors, and a receiver was appointed, to whom the debtor made a general conveyance of his property by order of the court. The real estate was then sold by the receiver; but it was held that another creditor, whose judgment was recovered before the filing of the bill, and who was not a party to it, might sell the same real estate upon execution, and that the grantee, in the sheriff's deed, would acquire a title superior to that held by the purchaser from the receiver. The principle of this case is that a judgment creditor may rely on the lien of his judgment on real property, and on his means of enforcement at law, instead of resorting to equity. So, although the debtor has made a prior conveyance, yet the creditor may sell on execution, and the purchaser will have the right of impeaching the debtor's conveyance as fraudulent; and, if the creditor's judgment was recovered before other creditors institute proceedings in equity, nothing in the course or result of those proceedings can affect the rights of the purchaser under the judgment: *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347.

Garnishment.—A receiver cannot, independently of statute, be garnished without leave of the court which appointed him: *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899; *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84; *People v. Brooks*, 40 Mich. 333, 29 Am. Rep. 534; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Kreisle v. Campbell*, 89 Tex. 104; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 68 Fed. Rep. 685; *Citizens' etc. Sav. Bank v. Bay Circuit Judge*, 110 Mich. 633. See *Irwin v. McKechnie*, 58 Minn. 145, 49 Am. St. Rep. 495. But he may be garnished, by permission of the court, for any balance remaining in his hands, after the exe-

cution of his trust, and the satisfaction of liens on the property held by him. There is no substantial reason why this may not be done, as surplus in the hands of a lienor may be reached by the process of garnishment: *Cohnen v. Sweeney*, 105 Mich. 643; *Citizens' Bank v. Bay* Circuit Judge, 110 Mich. 633.

Injunction.—The bringing of garnishment proceedings against a receiver may be enjoined: *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 59 Fed. Rep. 523. A receiver may be appointed and an injunction granted at the suit of a judgment creditor to restrain the debtor from selling his goods, notwithstanding a prior mortgage thereon, not yet due, to another person: *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; but a bill for an injunction, to prevent a debtor from disposing of his property, and for the appointment of a receiver, is insufficient, unless it shows that the complainant has a lien as judgment creditor, or otherwise, upon the defendant's property: *Uhl v. Dillon*, 10 Md. 500, 69 Am. Dec. 172. An injunction may be granted against an execution sale of property attached while in the hands of a receiver: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776.

Judgment.—A court of equity, having the possession of property through the medium of a receiver, will preserve the lien of a judgment obtained prior to the appointment of the receiver: *Lang v. Macon Construction Co.*, 101 Ga. 343, 344; *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837; *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317; *Scott v. Farmers' etc. Trust Co.*, 69 Fed. Rep. 17; but such a judgment creditor does not acquire any priority unless his judgment is a lien, or he acquires a lien, in the method otherwise provided by law, as by the issue of execution; for, unless he has a lien, he stands as a general creditor: *Central Trust Co. v. East Tennessee etc. R. R. Co.*, 30 Fed. Rep. 895; *Smith v. Sioux City etc. Seed Co.*, Iowa, May, 1899; *Farmers' etc. Trust Co. v. Detroit etc. R. R. Co.*, 71 Fed. Rep. 29; *Smith v. Maine etc. Accident Assn.*, 86 Me. 229; *Dugger v. Collins*, 69 Ala. 324; *Mercantile Trust Co. v. Baltimore etc. R. R. Co.*, 79 Fed. Rep. 389. Thus, a mere judgment for personal injuries is not entitled to priority of satisfaction out of funds in the hands of a receiver, where the judgment is no lien: *Central Trust Co. v. East Tennessee R. R. etc. Co.*, 30 Fed. Rep. 895; *Farmers' etc. Trust Co. v. Detroit etc. R. R. Co.*, 71 Fed. Rep. 29; *Davenport v. Receivers*, 2 Woods, 519; *Farmers' etc. Trust Co. v. Green Bay etc. Ry. Co.*, 45 Fed. Rep. 664.

But it is well settled that when a court of equity, in the administration of the assets of a debtor, lawfully takes into its possession, through the medium of a receiver, the assets and property of a debtor, no creditor can obtain a preference or priority over other creditors by lien on any judgment rendered after the receiver has the property of the debtor actually in his possession; and this is true, even though the suit upon which the judgment was rendered was filed before the receiver actually took charge of the property: *Lang v. Macon Construction Co.*, 101 Ga. 343; *Mercantile Trust Co.*

v. Southern States etc. Timber Co., 86 Fed. Rep. 711; Jackson v. Lahee, 114 Ill. 287; Ellicott v. United States Ins. Co., 7 Gill, 307; Fidelity etc. Safe Deposit Co. v. Roanoke Iron Co., 81 Fed. Rep. 439; Branam v. Excelsior Shoe Co., 94 Ga. 465; Moran v. Sturges, 154 U. S. 256; Attorney General v. Continental Life Ins. Co., 28 Hun, 360; Cowan v. Pennsylvania Plate Glass Co., 184 Pa. St. 1; Danforth v. National Chemical Co., 68 Minn. 308. A judgment against a corporation, obtained between the entry of an order appointing a receiver therefor and the approval of his bond, creates no lien on the property subject to the receivership: Temple v. Glasgow, 80 Fed. Rep. 441; Connecticut River Banking Co. v. Rockbridge Co., 73 Fed. Rep. 709. The status of all creditors is fixed as of the time of the entry of the order of the receiver's appointment, and not from the date of the approval of his bond. Hence, a judgment recovered after the appointment of the receiver, whether entered by leave of court or not, is not a lien on the receivership fund, and is not entitled to any preference or priority: Cowan v. Pennsylvania Plate Glass Co., 184 Pa. St. 1; Connecticut River Banking Co. v. Rockbridge Co., 73 Fed. Rep. 709. Contra, Edwards v. Edwards, L. R. 2 Ch. Div. 291; Frayser v. Richmond etc. R. R. Co., 81 Va. 388, holding that a person is not constituted receiver until he has given security, and that the levy of an execution, before such time, on the property about to be placed in his hands as receiver, creates a valid lien entitled to priority. After a receiver has been appointed to take charge of the assets of an insolvent corporation, a judgment subsequently is not a lien on its real estate: Fidelity etc. Safe Deposit Co. v. Roanoke Iron Co., 81 Fed. Rep. 439. And a judgment against a debtor, docketed after an assignment to a receiver, pursuant to an order of court in a creditor's suit, of land alleged to have been fraudulently conveyed away by such debtor, is not a lien thereon: Chautauque County Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442. It has been held, however, that when a decree appointing a receiver and awarding an injunction, so far as disclosed upon its face, was to provide for the safe-keeping of the property of the corporation, and to prevent any transfers thereof, and such decree did not state that the ulterior intent of the court was to make an equitable distribution of the funds, and contained no direction to the receiver to give notice to the creditors to file their claims, the decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and that a judgment subsequently recovered by a creditor is as much a lien on the real estate of the corporation debtor as if the appointment of a receiver had never been made: Ellicott v. United States Ins. Co., 7 Gill, 307; Moore v. Southern States etc. Timber Co., 83 Fed. Rep. 399.

If the lien of a judgment creditor on land exists before the appointment of a receiver, the creditor may sell under execution without incurring a contempt, and the purchaser acquires a valid title, but it is otherwise as to personal property, because that is in the actual possession of the receiver, and there is no lien acquired with-

out a levy: Albany City Bank v. Schermerhorn, 9 Paige, 372, 38 Am. Dec. 551; Chautauque County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Skinner v. Maxwell, 68 N. C. 400; Carlin v. Hudson, 12 Tex. 202, 62 Am. Dec. 521; Bostic v. Young, 116 N. C. 766.

As to personal property which is the subject of levy and sale on execution, a creditor, by an equity suit, such as a creditors' bill, acquires no preference or priority, as against a judgment creditor of the debtor, until the entry of an order appointing a receiver in such suit. The vigilant creditor, who, by his execution, seizes and sells the property of his debtor, before the appointment of a receiver in an equity action, secures a preference or priority which the law sanctions and protects: Davenport v. Kelly, 42 N. Y. 193, 199. The proper remedy for a judgment creditor, who desires to question the receiver's right to the property in the latter's custody, is to apply to the court appointing him, to have the property released from the receiver's custody, in order that he may proceed against it under his judgment: Dugger v. Collins, 69 Ala. 324, 330; Wiswall v. Sampson, 14 How. 52, 65.

Mechanics' Liens.—A mechanic's lien is not affected by the appointment of a receiver for the property: Totten etc. Foundry Co. v. Muncie Nail Co., 148 Ind. 372; Girard Life Ins. etc. Trust Co. v. Cooper, 51 Fed. Rep. 332; De Visser v. Blackstone, 6 Blatchf. 235. Compare Griffin v. Booth, 152 Ill. 219, as to the effect of a contract, on funds in the receiver's hands, waiving a lien for materials. The holder of receivers' certificates takes them subject to a mechanic's lien on the property: Gordon v. Newman, 62 Fed. Rep. 686. A court of equity, in giving a preference to claims having a superior equity, will not consider the rights of the claimants, under the mechanic's lien law, though they assert them: Atlantic Trust Co. v. Woodbridge etc. Irr. Co., 86 Fed. Rep. 975, 981. As between a receiver, appointed in supplementary proceedings against a contractor, and a mechanic's lienor who filed his lien after the commencement of the proceedings, but before the appointment of the receiver, the title of the receiver antedates the lien, and he has, therefore, a superior claim to the debt. The general rule is, that mechanics' lienors, on filing notices of lien, take their liens subject to any rights theretofore acquired by third persons in good faith, from or under the contractor, and that whatever right such persons may assert against him, or the owner, in or to the debt, whether such rights spring from voluntary arrangement or contract, or are acquired by operation of law, may also be asserted against persons who, as laborers or materialmen, might have previously filed notices of lien, but omitted to do so: McCorkle v. Herrman, 117 N. Y. 297, 305, per Andrews, J. The consent of the court which appoints a receiver, that the latter may be made a party defendant to an action in another court, the purpose of which is to foreclose a mechanic's lien on the property which existed at the time the receiver was appointed, is not a relinquishment of the possession and control of the property; and such other court is not, therefore, authorized to render a

judgment directing a public sale of the property: Premier Steel Co. v. McElwaine-Richards Co., 144 Ind. 614. On the other hand, the appointment of a receiver by a federal court for property already charged with a mechanic's lien under a judgment rendered in a state court, does not withdraw the property from the jurisdiction of the state court, nor prevent a valid sale thereof under special execution issued by the state court: Rodgers etc. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 53 Am. St. Rep. 494.

Partnership.—The rule is well settled that the appointment of a receiver in a suit between partners for a dissolution and accounting will not affect the claims of creditors which have previously become liens. Such liens must be recognized and enforced to the same extent as though no receiver had been appointed: Hoffman v. Schoyer, 143 Ill. 598, 615. The right of a third person to intervene in an action for the settlement of partnership affairs is not enlarged or diminished by the action of the court in appointing a receiver, nor by the latter's conduct after such appointment. It has been held, however, that a creditor of an individual partner, who has merely an attachment lien upon his interest in the partnership, is not entitled, for want of a direct interest, to intervene in an action to wind up the affairs of the partnership, which have been placed in the hands of a receiver: Isaacs v. Jones, 121 Cal. 257. Compare Runner v. Scott, 150 Ind. 441. A simple contract creditor who, after judgment, files a creditor's bill, is in no better position than a receiver to resist the enforcement of pre-existing liens against a partnership: Hoffman v. Schoyer, 143 Ill. 598. An attaching creditor who has levied upon the interest of an individual partner in the partnership assets has no right to delay the action to wind up the affairs of the partnership until the recovery of judgment in the attachment suit: Isaacs v. Jones, 121 Cal. 257, 262. The recovery of a judgment against partners, after the appointment of a receiver of the firm assets for the benefit of firm creditors, does not create any lien against property or funds of the firm in the hands of the receiver: Jackson v. Lahee, 114 Ill. 287. But, if a receiver is appointed on a bill filed by one partner against his copartner, merely to hold the property or funds pending litigation between the parties, creditors of the firm need not wait until the equities between the parties are adjusted, for that may never be done; but they may proceed, in any lawful way, to acquire a lien entitling them to priority over less diligent creditors, as, in such a case, the assets are treated as still belonging to the firm: Jackson v. Lahee, 114 Ill. 287. A court has the right to direct a receiver to continue the business of a firm, under circumstances showing that a continuance would be for its benefit, to borrow money for that purpose, and to make the amount borrowed a first lien on the property belonging to the trust estate in the receiver's hands: Blythe v. Gibbons, 141 Ind. 332.

Payment.—If attaching and preferred creditors, before the appointment of a receiver, have secured a lien on property which they afterward turn over to him under an agreement that their claims

shall be paid in preference to those of the general creditors, the court is authorized to direct the receiver to pay the amount of their claims, in preference to those of the general creditors, out of the proceeds of the property on which they have secured such lien; but, so far as such order directs the payment of their claims out of the proceeds of property other than that on which their lien has attached, it should be vacated: *Smith v. Sioux City etc. Seed Co.*, Iowa, May, 1899. A first mortgagee is entitled to be paid all earnings and rents collected by a receiver, where his mortgage lien is prior in time and superior in equity to the claims of judgment creditors: *McKenzie v. Bismark Water Co.*, 6 N. Dak. 361. Compare *Akerman v. Moon*, 81 Ga. 688. The lien of a mortgage cannot be postponed, by a receiver, to the payment of a judgment lien which is subordinate to that of the mortgage: *Farmer's Loan & Trust Co. v. Northern Pac. R. R. Co.*, 68 Fed. Rep. 36.

Railroads.—A mortgage of the road, and present and subsequently acquired property, of a railroad company, executed to secure the payment of its bonds, is, while it retains possession, a prior lien upon the net earnings of the road; but such earnings, while the road is in the possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders: *Hale v. Frost*, 99 U. S. 389. Such claims are without the scope of this note, but they are discussed in the note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 400-433. As to such claims having superior equities, see, also, the following cases: *Quincy etc. R. R. Co. v. Humphreys*, 145 U. S. 82; *Virginia etc. Coal Co. v. Central etc. Banking Co.*, 170 U. S. 355; *Central Trust Co. v. Wabash etc. Ry. Co.*, 34 Fed. Rep. 259; *Welden Nat. Bank v. Smith*, 86 Fed. Rep. 398; *Louisville etc. R. R. Co. v. Central Trust Co.*, 87 Fed. Rep. 500; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. Rep. 140; *Grand Trunk Ry. Co. v. Central Vermont R. R. Co.*, 88 Fed. Rep. 620, 622, 90 Fed. Rep. 163; *Central Trust Co. v. Chattanooga etc. R. R.*, 89 Fed. Rep. 388; *United States Trust Co. v. Wabash etc. Ry. Co.*, 150 U. S. 287; *Terre Haute etc. R. R. Co. v. Harrison*, 88 Fed. Rep. 913; *Olyphant v. St. Louis etc. Steel Co.*, 28 Fed. Rep. 729, 732; *Union Loan and Trust Co. v. Southern etc. Road Co.*, 49 Fed. Rep. 267; *Farmers' etc. Trust Co. v. Detroit etc. R. R. Co.*, 71 Fed. Rep. 29; *Grand Trunk Ry. v. Central Vermont R. R. Co.*, 78 Fed. Rep. 690; *Central Trust Co. v. East Tennessee etc. R. R. Co.*, 80 Fed. Rep. 624; *Randolph v. Farmers' etc. Trust Co.*, 91 Tex. 605; *St. Louis etc. R. R. Co. v. O'Hara*, 177 Ill. 525, 533; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705; *Crosby v. Morristown etc. R. R. Co.*, Tenn. Ch. App., July, 1897; *Houston etc. Ry. Co. v. Crawford*, 88 Tex. 277, 53 Am. St. Rep. 752. A claim of damages for death caused by negligence, for personal injuries, or for a tort, is not entitled to priority over the claim of bondholders unless some equity is shown, or there is a judgment therefor, which has become a prior lien: *New York etc. Trust Co. v. Louisville etc. R. R. Co.*, 79 Fed. Rep. 386; *Green v. Coast Line R. R. Co.*, 97 Ga.

15, 54 Am. St. Rep. 379; Farmers' etc. Trust Co. v. Northern Pac. R. R. Co., 74 Fed. Rep. 431; Farmers' etc. Trust Co. v. Detroit etc. R. R. Co., 71 Fed. Rep. 29. Again, we wish to emphasize the fact that the holder of a superior equity may or may not have a lien.

With respect to claims, however, which have become a lien against railroad property before it is placed in the hands of a receiver, the same rule applies as in other cases. They must be preserved, particularly if the statute provides for the preservation of all existing liens: State v. Port Royal etc. Ry. Co. 84 Fed. Rep. 67; Clarke v. Central R. R. etc. Co., 54 Fed. Rep. 556; Park v. New York etc. R. R. Co., 64 Fed. Rep. 190; Third St. etc. Ry. Co. v. Lewis, 79 Fed. Rep. 196; Thomas v. Cincinnati etc. Ry. Co., 91 Fed. Rep. 202. Thus, a judgment entered in an action for an injury to personal property, brought within twelve months from the date of the cause of action, is a lien prior to that of a railroad mortgage, even if it is not a claim against the receivership: State v. Port Royal etc. Ry. Co., 84 Fed. Rep. 67. If the earnings of a railroad in the hands of a receiver are not sufficient to pay all its creditors, after paying operating expenses, and keeping the property in safe condition for operation, they will be applied to the payment of creditors who hold liens or contracts which, if not paid, they would be entitled to enforce, and the enforcement of which would endanger the integrity of the property: Mercantile Trust Co. v. Baltimore etc. R. R. Co., 82 Fed. Rep. 360, 362. The remedy for enforcing the lien of a mortgage on a railroad and rolling stock, to be subsequently acquired, is pointed out in Morrill v. Noyes, 56 Me. 458, 96 Am. Dec. 486.

If the statute gives a lien upon railway property to creditors who furnish supplies or labor, the appointment of receivers in a proceeding by bondholders for foreclosure does not affect such lien: Poland v. Lamoille Valley R. R. Co., 52 Vt. 144. Statutory liens should be paid before mortgage bonds: See an extended discussion of this matter in the note to Green v. Coast Line R. R. Co., 54 Am. St. Rep. 423. So, if the statute confers the right to attach the rolling stock and other personal property of a railroad company, and subjects the rights of mortgage creditors to those of the attaching creditors, the latter may pursue their remedy, and, if it proves insufficient to pay their claims, they are entitled to priority of payment, over the mortgage creditors, out of the net income: Poland v. Lamoille Valley R. R. Co., 52 Vt. 144. Claimants having statutory liens against a railroad for labor performed in its construction, operation, and maintenance, who, before such liens expire, are prevented from enforcing them by the appointment of a receiver, will not be denied the priority to which they are entitled, merely because their claims accrued more than six months before the appointment of the receiver, notwithstanding the court has made a provisional order prescribing six months as the limit of time within which claims to be entitled to priority must have accrued: McIlhenny v. Binz, 80 Tex.

1, 26 Am. St. Rep. 705; extended note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 413. A judgment for damages against a railroad company, obtained before the appointment of a receiver, and which, by virtue of the statute, binds all property of the defendant, both real and personal, from the date of the judgment, has been held to have priority, at least so far as income is concerned, over a previous mortgage of the company's property, including income, where the property is in the hands of receivers: *Green v. Coast Line R. R. Co.*, 97 Ga. 15, 54 Am. St. Rep. 379. It is remarked in the opinion, however, that "every direct authority known to us is against us; nevertheless, we are right and these authorities are all wrong, as time and further judicial study of the subject will manifest": *Green v. Coast Line R. R. Co.*, 97 Ga. 15, 36, 54 Am. St. Rep. 379, 395. Creditors entitled to statutory liens, against railroad property, under the laws of a state may present their claims and have their liens enforced in a federal court, whose receiver is in possession of the property, with the same effect as if they proceeded in the courts of the state: *Blair v. St. Louis etc. R. R. Co.*, 19 Fed. Rep. 861. Where claims against a railroad company are numerous, complicated, and conflicting, and, by consent of all parties, a decree is entered, fixing their priorities and liens, new liens cannot afterward be asserted, in the absence of fraud, mistake of fact, or newly discovered testimony: *Minnehan v. Brunswick etc. R. R. Co.*, 52 Ga. 248.

Receivers' Certificates.—Orders of court giving priority to receivers' certificates for certain claims or indebtedness have been sustained with respect to railway and like property upon the principles announced in the extended note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 431. See, also, *Phinzy v. Augusta R. R. Co.*, 62 Fed. Rep. 771; *Humphreys v. Allen*, 101 Ill. 490; *Crosby v. Morristown etc. R. R. Co.*, Tenn. Ch. App., July, 1897. But, as said in a comparatively late case, and with respect to mortgaged railroad property: "Those who take receiver's certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property, and who have not, but should have been, brought before the court. While the court, under some circumstances, and for some purposes, and in advance of the prior lienholders being made parties, may have jurisdiction to charge the property with the amount of receiver's certificates issued by its authority, it cannot, without giving such parties their day in court, deprive them of their priority of lien. When such prior lienholders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect, and amount of all such certificates, as fully as if such questions were then, for the first time, presented for determination. If it appears that they ought not to have been made a charge upon the property, superior to the lien created by the mortgages, then the contract rights of the prior lienholders must be protected. On the other hand, if it appears that the court did what ought to have been done,

even had the trustee and the bondholders been before it when the certificates were authorized to be issued, the property should not be relieved from the charge made upon it, in good faith, for its protection and preservation": *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434, 460. See, also, *Mercantile Trust Co. v. Kanawha Ry. Co.*, 58 Fed. Rep. 6; reversing the same case, 50 Fed. Rep. 874. If a person holds a mechanic's lien against a railroad, but, without his being made a party to the proceedings, the property is sold for an indebtedness created by the receiver, declared to be a first lien on the property, such sale does not divest the lien, but it may be enforced: *Snow v. Winslow*, 54 Iowa, 200.

When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safekeeping and preservation are properly payable out of the income, if there is any, or, if there is none, then out of the proceeds of the corpus of the estate when sold. "But this necessary power," says McSherry, J., delivering the opinion of the court in *Hooper v. Central Trust Co.*, 81 Md. 559, 591, "by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. 'Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent encumbrances.' That liens created through the medium of receivers' certificates will not be allowed, in respect to the property of private corporations or of individuals, to take priority over pre-existing liens: see *Farmers' etc. Trust Co. v. Bankers' etc. Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690; *Hanna v. State Trust Co.*, 70 Fed. Rep. 2; *Doe v. Northwestern etc. Transp. Co.*, 78 Fed. Rep. 62; *Laughlin v. United States Rolling-Stock Co.*, 64 Fed. Rep. 25. Compare *Lewis v. Linden Steel Co.*, 183 Pa. St. 248; *Kent v. Lake Superior etc. Iron Co.*, 144 U. S. 75. A receiver's certificates, issued by the receiver of a merely private corporation, are not a charge upon its assets, prior to that of existing liens, without the consent of all creditors whose liens would be affected thereby: *Doe v. Northwestern etc. Transp. Co.*, 78 Fed. Rep. 62; *Farmers' etc. Trust Co. v. Grape Creek Coal Co.*, 50 Fed. Rep. 481; *Baltimore etc. Loan Assn. v. Alderson*, 90 Fed. Rep. 142. "It would be exceedingly dangerous to concede to a court of equity the power to displace, in favor of receivers' certificates, subsisting liens on the property of private corporations, or of individuals. No mortgage lien would ever be secure if it were liable to be postponed to subsequent obligations created by a receiver. If the power exists at all, apart from the case of a railroad mortgage, there is no reason for denying its applicability to every species of mortgage, and a mortgagee might suddenly discover that what he believed to be an ample se-

curity, has been utterly destroyed and swept away by intervening liens, created subsequently by an order of the court. We are unable to give our assent to such a doctrine": *Hooper v. Central Trust Co.*, 81 Md. 559, 593, per McSherry, J.

Receivers' Sales.—Liens upon property held by a receiver are not divested by virtue of a sale made by him: *Snow v. Winslow*, 54 Iowa, 200. Thus, upon a receivers' sale of property on which there is a mechanic's lien, the lien is not displaced: *Snow v. Winslow*, 54 Iowa, 200; but may attach to the proceeds of the sale: *Totten etc. Co. v. Muncie Nail Co.*, 148 Ind. 372. And his sale of mortgaged property does not divest or affect the paramount mortgage lien of a stranger to the record: *Lorch v. Aultman*, 75 Ind. 162. In the same manner, the lien of a judgment owned by a stranger to a suit in which a receiver is appointed over a partnership, against the individual interest in real estate of one member of the firm, remains upon the property, notwithstanding it has been sold by the receiver: *Foster v. Barnes*, 81 Pa. St. 377; and a sale by a receiver does not bar statutory liens established by judgments in state courts, if the petitions of the judgment creditors to intervene in the foreclosure proceedings in a federal court in which the receiver was appointed have been denied without prejudice, although the judgments were obtained during the pendency of the foreclosure suit, while the receiver was in possession of the property, and without making him a party: *Blair v. Walker*, 26 Fed. Rep. 73. If a judgment is rendered against a railroad company and its receiver after title has passed to another company, the latter is not liable for the judgment, though the property was not actually turned over until after the rendition of the judgment: *Brockert v. Iowa Cent. Ry. Co.*, 93 Iowa, 132. After a receiver's sale, unsatisfied, pre-existing lienholders may levy upon and sell the property: *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317. As against the purchaser at a valid receiver's sale, no lien can be made to attach to the property which did not rest upon it at the time of the institution of the suit under which the sale was made: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776.

Rent.—A landlord has the right to distrain goods on his premises, on the day that a receiver sells them, for rent in arrears on that day, but, as he cannot in an orderly way exercise his right, because of the receiver's manual possession, he necessarily has a lien on the fund raised by the sale of the goods, under the order of the court, which cannot be materially reduced by the expense of the receivership: *Lane v. Washington Hotel Co.*, Pa., March, 1899. Compare *Cooper v. Rose Valley Mills*, 174 Pa. St. 302; and *Gaither v. Stockbridge*, 67 Md. 222, 228. Rents should be applied by a receiver according to the priority of the several liens. Hence, if the lien of a mortgage is prior to that of a judgment, the rents should be applied upon the mortgage: *Cross v. Will County Nat. Bank*, 177 Ill. 33. A receiver adopting a lease, takes it subject to a lien created thereby for rent: *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155.

Statutory Liens.—The equitable doctrine whereby certain claims are

given precedence over mortgages of railway and like property, on bills for foreclosure and the like, filed by bondholders, is given in the extended note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 400-433. See, also, *Drennen v. Mercantile etc. Deposit Co.*, 115 Ala. 592, 67 Am. St. Rep. 72, extending the doctrine to other than railroad corporations. But the statute sometimes makes a claim for labor, material, wages, supplies, et cetera, a lien upon railroad property in the hands of a receiver, and such statutory liens should be paid before mortgage bonds. One who founds such a claim, however, wholly upon a state statute, must prove affirmatively the existence and priority of his lien in order to have it preferred over that of the first mortgage bondholder. This matter of the precedence of statutory liens, as applied to railroad property, is discussed in the extended note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 422. See, also, *Newgass v. Atlantic etc. Ry. Co.*, 72 Fed. Rep. 712. Liens for labor, wages, supplies, et cetera, are also given sometimes by statute on the property of other than railroad corporations which are in the hands of a receiver, for debts of that character outstanding at the time that the receiver was appointed: *Liberty etc. Loan Co. v. Furbush etc. Co.*, 80 Fed. Rep. 631; *St. Paul etc. Trust Co. v. Diagonal Coal Co.*, 95 Iowa, 551; *Fidelity etc. Deposit Co. v. Roanoke Iron Co.*, 81 Fed. Rep. 439; *Giles v. Stanton*, 86 Tex. 620; *Randolph v. Farmers' etc. Trust Co.*, 91 Tex. 605. It is not our purpose here to show, in detail, when a lien is acquired on the property. The main question in such cases is, "has the party claiming the lien observed the commands of the law, and been obedient to its requirements": *Liberty etc. Loan Co. v. Furbush etc. Co.*, 80 Fed. Rep. 631, 637.

Valid statutory liens, whether on railroad or other property, are not interfered with by the appointment of a receiver. Section 3149 b of the Code of Georgia provides, in substance, that no creditor shall acquire any preference, by any judgment or lien, on any suit or attachment, after the filing of an equitable bill or petition; that all assignments and mortgages to pay or secure existing debts, made after the filing of the bill, shall be vacated; and that the assets shall be divided pro rata among the creditors, preserving all existing liens. And, in commenting upon this section, *Simmons, C. J.*, delivering the opinion of the court in *Alexander v. Mercantile etc. Deposit Co.*, 100 Ga. 537, 538, and in which case a receiver was appointed, says: "Thus, it will be seen that no creditor, without a lien at the filing of the petition, can obtain one after it is filed in preference to any other creditor, but a creditor who has a valid lien when the petition is filed, is not interfered with. His lien is not displaced but preserved. He occupies the same place, as far as the lien is concerned, as if no petition had been filed and no receiver appointed. The priority and dignity of his lien stand upon the same plane they occupied before the commencement of the proceedings. Whatever may be the effect of a comparatively recent equitable doctrine announced by the federal and some of the state courts in

regard to certain preferential claims of certain creditors in the distribution of the assets of insolvent railroad companies, under creditors' bills, filed in those courts, we are clear that in a proceeding commenced under the above section of our code, no such preferential claims can exist. These preferential claims are not such liens as those mentioned in the above cited section. That section means legal liens, liens accrued by contract, or by judgment of the court, or those arising under a special statute. The defendant in error, in this case, before the filing of this bill had a valid subsisting mortgage lien on the property of the railroad company. That lien, we have seen, must, under the code, be preserved. It cannot be displaced by creditors who have no legal lien but who rely solely upon what they call a preferential equity."

A creditor's failure to claim and record his lien is not excused by the fact that the property on which it would have attached was put into the hands of a receiver, by judicial proceedings, at the instance of other creditors, before the time for recording had expired: *Filer v. Empire Lumber Co.*, 91 Ga. 657. Receivers empowered to operate the works of a corporation are not authorized to sweep away the entire value of the company's plant to the detriment of labor claimants having pre-existing liens, fixed upon the plant: *Gillespie v. Blair Glass Co.*, 189 Pa. St. 50. Under the Iowa statute, if the levy of an attachment on the property of a corporation is abandoned, laborers who fail to file their claims with the sheriff are not prejudiced, where they file them with the receiver, subsequently appointed, within thirty days after the appointment. Their claims are superior to those of corporation bondholders secured by trust deed, and take priority over compensation due a trustee and his attorney for services in the foreclosure of a trust deed on the corporate property, but are subordinate to the fees of a receiver and his attorney: *St. Paul etc. Trust Co. v. Diagonal Coal Co.*, 95 Iowa, 551. It is error to enter a decree making claims of the receiver for money expended after a sale of property, a lien thereon antedating the decree under which it was sold: *Bassick Min. Co. v. Schoolfield*, 15 Colo. 376. The rights of bondholders, executed before the passage of the 'Texas receivers' act, cannot be affected or prejudiced by any lien which the court is authorized to impose under the provisions of that act: *Foreman v. Central Trust Co.*, 71 Fed. Rep. 776, 782; or which is authorized by the act itself. Thus, a provision in the act, that judgment against a receiver for a cause of action arising during the receivership shall be a superior lien to a prior mortgage, does not give such a judgment a preference over a mortgage executed before the passage of that law: *Fordyce v. Du Bose*, 87 Tex. 78.

Taxes.—When property is rightfully in the custody of a receiver, it is not exempt from the imposition of taxes, and the lien for taxes is superior to all other liens whatsoever, except judicial costs: *In re Tyler*, 149 U. S. 164, 182; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. Rep. 140; *Comer v. Polk County*, 81 Fed. Rep.

921, 924; *Farmers' etc. Trust Co. v. Detroit etc. R. R. Co.*, 71 Fed. Rep. 29; *Marshall etc. Bank v. Cady*, Minn., April, 1899. A sale of property, in the custody of a receiver, for taxes is void, even if the state buys the property in: *Virginia etc. Iron Co. v. Bristol Land Co.*, 88 Fed. Rep. 134. If property coming into the hands of a receiver is subject to a lien for taxes, and no specific remedy for the enforcement of such lien is provided by statute, the court may order them paid, as a preferred claim, out of the proceeds of the property: *Duryee v. United States Credit System Co.*, 55 N. J. Eq. 311. State, county, and city taxes accruing before, and during, the receivership are, by the Texas statute, made a first lien upon the property, but not upon the earnings: *Randolph v. Farmers' etc. Trust Co.*, 91 Tex. 605.

Vendor's Lien.—After personal property of an insolvent corporation has been put into a receiver's hands, it is too late for the vendor of such property, who sold it to the corporation, to obtain a specific attachment to enforce the payment of the purchase money: *Halpern v. Clarendon etc. Lumber Co.*, 64 Ark. 132. One who has a vendor's lien on property in the hands of a receiver should make an effort to enforce or protect it by a reasonable application to the court: *Remington Paper Co. v. Watson*, 49 La. Ann. 1296. Compare *United States v. Guglard*, 79 Fed. Rep. 21.

The Right of a Creditor to Share in the distribution of the debtors assets, by a receiver, is not affected by the fact that his claim is secured by a mortgage on other property: *Taylor v. Moore*, 64 Ark. 23. Neither is he guilty of laches, where he has neglected to file his claim with the receiver, until after the latter has applied to the court for leave to distribute assets, if he has an attachment against the property pending and undisposed of, and no notice has been given to creditors to present their claims to the receiver: *Taylor v. Moore*, 64 Ark. 23. A creditor of an insolvent corporation, whose assets are in the hands of a receiver, has a right to prove and have dividends upon his entire debt, irrespective of any collateral securities or liens held by him: *People v. Remington*, 121 N. Y. 328, 335.

HAMILTON v. LOVE.

[152 INDIANA. 641.]

SERVICES—COMPLAINT IN ACTION FOR—DEMURRER.

A complaint by an employé, in an action for his wrongful discharge, is good on demurrer, where it alleges a violation of the contract of employment, and the amount that the plaintiff would have earned under it. Nothing more than the loss of compensation agreed upon for the unexpired term need be shown, as this is a sufficient allegation of damages.

SERVICES—WRONGFUL DISCHARGE OF EMPLOYÉ.—THE REMEDY of an employé, discharged without sufficient cause, before the expiration of the period of service stipulated for, is not in assumpsit as for implied services, or for wages, but is for damages for breach of the contract.

SERVICES—WRONGFUL DISCHARGE OF EMPLOYÉ.—THE MEASURE OF DAMAGES for the wrongful discharge of an employé, before the expiration of the period of service stipulated for, is an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, and which probably, can, by reasonable diligence, be earned during the time covered by the breach.

SERVICES — COMPLAINT — UNNECESSARY ALLEGATION—MATTERS OF DEFENSE.—It is not necessary, in an action by an employé wrongfully discharged before the expiration of his term of service, for the complaint to allege that, since the discharge of the employé, he has been unable to obtain employment, and has earned nothing. If he has, or, by the exercise of reasonable diligence, could have obtained employment, or earned wages after his discharge, the facts are matters of defense, and must be established by the employer.

SERVICES—DISCHARGE OF EMPLOYÉ—INSUFFICIENT CAUSE FOR—OBSERVANCE OF RULES.—It is not good cause for the discharge of an employé before the expiration of his term of service, that he fails to observe his employer's rules for the conduct of business, where he does not have notice of such rules.

SERVICES—DISCHARGE OF EMPLOYÉ—INSUFFICIENT CAUSE.—Trivial and unimportant acts of disobedience or negligence are not a good cause for the discharge of an employé before the expiration of his term of service, particularly after the employer has previously passed them without complaint.

SERVICES—WRONGFUL DISCHARGE OF EMPLOYÉ—REMEDY.—An employé, who has been wrongfully discharged before the expiration of his term of service, may sue at once for a breach of the contract, and recover his full damages to the end of the term. Or he may sue after the expiration of the term, within the statutory limit, but the measure of damages is the same in either case, for there can be but a single action.

INSTRUCTIONS—CONSIDERATION OF, AS A WHOLE.—Instruction should be construed with reference to each other. The entire charge should be taken as a whole, and not in detached parts.

INSTRUCTIONS—APPEAL—REVERSAL.—A cause will not be reversed on appeal, though the whole of the law upon a particular head is not fully stated in one or more of the separate parts of the charge to the jury, if the instructions to them, taken as a whole, correctly state the law.

SERVICES—DEFENSE THAT WAGES WERE EARNED AFTER WRONGFUL DISCHARGE—SETOFF.—In an action by an employé wrongfully discharged before the expiration of his term of service, the fact that he earned wages after his discharge may be set up by way of partial answer to reduce the amount of his recovery, but cannot be pleaded as a setoff.

INSTRUCTIONS—PRESUMPTION AS TO, ON APPEAL.—Upon an appeal every reasonable presumption is indulged in favor of the action of the trial court and this presumption extends to the giving of instructions as well as to any other of the proceedings.

S. R. Hamill, S. C. Stimson, A. M. Higgins, H. A. Condit, and R. B. Stimson, for the appellants.

W. Mack, D. W. Henry, G. M. Crane, D. V. Miller, and A. L. Miller, for the appellee.

642 DOWLING, J. Action by appellee for damages for breach of executory contract for employment.

The alleged breach consisted in the wrongful discharge of appellee while the contract had one year and eight months to run, for which time he would have been entitled at the contract rate to three thousand six hundred dollars, payable in monthly installments. Verdict and judgment for appellee.

The overruling of the demurrer to the complaint, and the giving of certain instructions, are the errors complained of. The specific objections to the complaint are that "it does not allege damages," and that "it fails to show that appellee could not, with reasonable care and diligence, have obtained other equally profitable employment."

The complaint shows the contract, and a total breach by appellants by the wrongful discharge of appellee; it alleges the readiness and willingness of appellee to continue in such employment; it avers that by the contract appellee would have received one hundred and fifty dollars per month for the eight months remaining of the second year, and two hundred dollars per month for the third and last year; and it concludes with a prayer for damages for the violation of the contract by appellants, and a demand for judgment for three thousand six hundred dollars.

These facts were sufficient to constitute a cause of action. The remedy of a servant discharged without sufficient cause, before the expiration of the period of service stipulated for, is not in assumpsit as for implied services, or for wages, but is for damages for the breach of the contract: *Ricks v. Yates*, 5 Ind. 115; *Richardson v. Eagle Machine Works*, 78 ⁶⁴³ Ind. 422, 41 Am. Rep. 584; *Aetna Life Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91; *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Tiffin Glass Co. v. Stoeher*, 54 Ohio St. 157.

In such cases, the measure of damages is an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, and which probably can by reasonable diligence be earned during the time covered by the breach: *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Richardson v. Eagle Machine Works*, 78 Ind. 422, 41 Am. Rep. 584; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *James v. Allen Co.*, 44 Ohio St. 226, 58 Am. Rep. 821; *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273; *Costigan v. Mohawk etc. R. R. Co.*, 2 Denio. 609, 43 Am. Dec. 758; *King v. Steiren*, 44 Pa. St. 99, 84 Am. Dec. 419.

The allegations of the complaint, touching the loss appellee sustained by the breach, are equivalent to a direct averment that he had been damaged to the amount charged. The sufficiency of the averment is to be tested by the rule as to damages under such circumstances and nothing more need be shown on this subject than the loss of the compensation agreed upon for the unexpired term.

The second objection to the complaint is equally untenable. It is not necessary that the discharged servant should allege in his complaint that since his discharge he has been unable to obtain employment, and has earned nothing. If he has, or by the exercise of reasonable diligence could have, obtained employment, or earned wages after his discharge, these facts are matters of defense, and must be established by the master: *Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177; *Gazette etc. Co. v. Morss*, 60 Ind. 153; *Cincinnati etc. Ry. Co. v. Lutes*, 112 Ind. 276; *Hinchcliffe v. Koontz*, 121 Ind. 422, 16 Am. St. Rep. 403; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630; *East Tennessee etc. R. R. Co. v. Staub*, 7 Lea, 397.

At the trial, the court gave certain instructions, and modified others, and of this action the appellants complain. One of the instructions given, after modification, was this: "If ⁶⁴⁴ you believe from the evidence that the plaintiff, within the scope of his alleged employment as solicitor of life insurance, refused to obey or submit to the directions or rules of the defendants, *having notice of such directions or rules*, or that he so behaved himself as to make it difficult or disagreeable for them to direct and control him in the performance of his alleged duties, the defendants had a right to discharge him from their service, and he cannot recover damages therefor."

The modification complained of consisted in adding the words we have italicized. In this we find no error. If appellants had rules or regulations for conducting their business, and which the servant was required to observe, it was their duty to make them known to him. If the servant had no notice of such rules and regulations, he could not be expected to conform his conduct to them.

Another instruction given as modified was as follows: "By the terms of the contract set out in the complaint, the plaintiff sold his services to the defendants for a stipulated time and for a stipulated price. During the time stipulated in the contract, the defendants not only had the right to such services, but they had a right to direct and control the plaintiff in the performance

of such services; and, if the plaintiff refused to submit to such directions and control, in *material matters*, the defendants had a right to discharge him, and such discharge would not be a breach of the contract, and the plaintiff would not be entitled to recover damages therefor."

The qualification of this instruction by the addition of the words, "in material matters," was proper. The master would have had no right to discharge the servant for trivial and unimportant acts of disobedience or negligence: Schouler on Domestic Relations, sec. 462. Whether there had been such disobedience was a question for the jury.

For the same reasons, it is our opinion that the trial court did not err in charging that, if it was found from the evidence that the appellee had made slight losses of time, and ⁶⁴⁵ had been disobedient in immaterial matters, after which he had been continued in the service for a considerable period without complaint from appellants, such conduct would not justify discharging him after such continued service. The contract was general in stating the time of service at three years, and was subject to such reasonable construction as to the hours of service, as the extent, character, and rules of the business of appellants should warrant. Both parties having acted upon a construction of it, and acquiesced in such construction for a considerable time, the master could not make a stale violation of the letter of the contract a pretext for discharging the servant.

Finally, it is complained that the court gave, at the appellee's request, the following instruction: "If plaintiff was wrongfully discharged twenty months before his contract expired, he had a right to sue at once for a breach of the contract, which he has done, and he would have a right to recover his full damages to the end of his term."

While there is much conflict among the authorities as to the measure of damages upon the wrongful discharge of a servant, the decisions in this state have been consistent and uniform upon this subject. There can be but a single action, and not successive actions. The action must be for damages for the breach of the contract, and not in assumpsit for constructive services, or for wages. All damages sustained by the servant, in consequence of the wrongful act of the master, whether present or prospective, must be included in the recovery. A single judgment for the injury bars all other claims. The suit may be brought at any time after the breach, either before the expiration of the term of the contract, or afterward, within the

statutory limit. But, whether brought before or after the expiration of the term of the contract, the measure of the damages is the same. If brought during the term, the difficulty in ascertaining the amount of the damages sustained may be greater than if the action had been deferred until the term of the contract had expired. ⁶⁴⁶ But the difficulty and uncertainty in such cases are not greater than in many others, where a permanent and continuing injury is alleged, and the plaintiff is confined to a single action for his damages: *Schell v. Plumb*, 55 N. Y. 592; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; 8 Am. & Eng. Ency. of Law, 2d ed., 651; *Wakeman v. Wheeler etc. Co.*, 101 N. Y. 205, 54 Am. Rep. 676.

The instruction under review was given in connection with others which explained and limited the general rule contained in the foregoing, and among these were the following:

"11. If you find from the evidence that the plaintiff can, with a reasonable effort, find employment, in the line of his business, the value of the unexpired time, under the contract sued on, or the sum he might earn by reasonable diligence, from this time until the expiration of the contract sued on, should be deducted from the amount he might otherwise be entitled to recover, if he is entitled to recover anything." "18. If you find defendant [plaintiff] performed his part of the contract for sixteen months, and was wrongfully discharged by defendants, he has a right to recover in this action whatever amount he has been damaged thereby. Under his agreement, he was to have at the rate of eighteen hundred dollars per year for the eight months of this year, and two thousand dollars for next year. From this amount, defendants may show what he has earned since his discharge, and what he may reasonably earn during the balance of the time for which he was employed; and, whatever is shown you must deduct from the contract salary; and you will also deduct interest on the salary from this time to the end of the term, i. e., you will rebate the interest on such sums as are to become due and give him a verdict for the balance."

All of the instructions given in a cause are to be construed with reference to each other, and the entire charge is to be taken as a whole, and not in detached parts. If it is consistent with itself, and, taken together, states the law correctly, it is not subject to objection, even if the whole of the law ⁶⁴⁷ upon a particular head is not fully stated in one or more of the separate parts of such charge.

We think the instruction complained of states the law correctly, and that it is sustained by the authorities hereinbefore cited. If it required elucidation or qualification, the other instructions given by the court were amply sufficient to enable the jury to make a proper application of the rule; and the amount of the verdict returned furnishes no indication that they misunderstood the law, or fell into error in applying it.

We have carefully examined all the cases and text-books referred to by counsel for appellant, but found nothing in them which inclines us to change our views of this case. We do not approve the doctrine stated in *McMullan v. Dickinson Co.*, 60 Minn. 156, 51 Am. St. Rep. 511, and *Gordon v. Brewster*, 7 Wis. 309 (*355), and decline to follow these cases.

Finding no error in the record, the judgment is affirmed.

ON PETITION FOR REHEARING.

DOWLING, J. In their petition for a rehearing, appellants complain that the court failed to consider the errors assigned upon the rulings on the demurrers to the second and fourth paragraphs of the answer.

The only reference made in the briefs of counsel for appellants to this branch of their case is the following: "The second paragraph of the answer is good, for the reason that the master owns, and is entitled to receive, all the earnings of the servant in the business in which he is employed. And, therefore, such earnings are a proper setoff to a demand for wages. The fourth paragraph is good, for the reason that it shows, specially, the nonperformance of the contract by appellee."

The evident insufficiency of the second paragraph of the answer, and the fact that the fourth was merely a special denial, taken in connection with the failure of counsel to discuss ⁶⁴⁸ either of them, created the impression that the errors assigned, upon these rulings, were not seriously insisted upon.

The second paragraph of the answer is bad. The action of the appellee was not for wages, but for damages for a breach of contract. His earnings belonged to him, and appellants had no claim upon them. The fact that appellee did earn wages after he was discharged by appellants might have been set up by way of partial answer to reduce the amount of appellee's recovery, but it could not be pleaded as a setoff.

Neither was this paragraph good as a partial answer, for the reason that it did not confess and avoid the complaint, or any part of it. The averments were that the appellants "fully com-

plied with all of the conditions of said contract on their part to be performed, but that the plaintiff refused and failed to comply with said contract." It then alleges that, while so acting and being otherwise engaged than in the service of appellants, the appellee earned and received for his own use six hundred dollars. If these allegations were true, appellants had a claim for damages for the breach of the contract, and appellee had no cause of action whatever against them. In such case, the measure of damages would not be what appellee had earned, but what appellants had lost.

The fourth paragraph of the answer, as we have stated, was a special denial. It was pleaded in connection with the general denial. The ruling on the demurrer to it was harmless, as all facts admissible under it could have been given in evidence under the general denial. It might, properly, have been stricken out on motion.

It is insisted that the trial court erred in giving instructions numbered 5 and 9, and that this error should reverse the judgment. These instructions were as follows:

"There is nothing in this contract that requires Love to work every day and hour for three years. It is to have a reasonable construction, and the fact that he had leave for two or three days to look after his private affairs, and did so, or that he went for a half-day to a fair, and a like time to the ⁶⁴⁹ races, without their permission, but with their subsequent knowledge, and no objection or protest was ever made to him, nor any complaint, or claim against him, and he continued in their employment for months afterward, such failures would not be ground for discharging him at the time he was discharged."

"Although the law requires an agent to obey all reasonable directions and orders of his employers, and the directions in which he failed, or refused to obey, were in unimportant matters, and no objections were ever made to him for such failures, and he continued in his employment, his failures or refusals would not be sufficient ground for discharge long after they occurred."

The objection made to these instructions is that the court assumed the existence of certain facts, and in so doing invaded the province of the jury.

Upon an appeal, every reasonable presumption is indulged in favor of the action of the trial court. These presumptions extend as well to the giving of instructions as to any other of the proceedings. If, under any circumstances, the instruction would be correct, we are bound to presume that such a state of

facts existed as warranted the court in giving the instructions. If such circumstances did not exist, the burden is upon the party complaining to overcome the presumptions of correctness: Elliott's Appellate Procedure, sec. 709, 722; Wilson v. Atlanta etc. Ry. Co., 82 Ga. 386; Hinds v. Harbou, 58 Ind. 121.

In the briefs filed on behalf of appellant, there is not a word in regard to the state of the evidence as to the facts so alleged to have been assumed by the court. Conceding, without deciding, that the court did assume the existence of the facts that appellee had leave for two or three days to look after his own affairs, and that he did so; that he went for half a day to a fair, and for a like time to the races, without permission; that appellants subsequently had knowledge of these facts; that they made no objection or protest to him; ⁶⁵⁰ that no complaint or claim was made on this account; and that appellee thereafter continued in the employment of appellants for some months—in the absence of any evidence to the contrary brought to our notice by appellants, we have the right to presume either that these facts were admitted on the trial, or that they were proved by the appellee, and not controverted by the appellants.

We have not thought fit, however, to rest upon this presumption. Without any assistance from the briefs in the case, we have carefully searched every line of the one hundred and ninety-seven pages of the record and found that the evidence stood as follows: The plaintiff, Love, testified to the following facts: "I put in all of the time, with the exception of three or four days that I gave an account of, an agreement before I took those days off": Record, p. 80, lines 19-21. "I was there [at the fair] one-half day. Did not make any direct report of it. I told those about the office, when I came to the office, that I had been to the fair": Record, p. 92, lines 11-16. "I do not think I said anything about it [the races]. I was at the races one-half day. I saw and recognized one or two of the firm there": Record, p. 94, lines 21-26. "I reported to the firm that I had spent a day or two at my own business": Record, p. 95, lines 5-10. "The fair was a good place to go to to form acquaintances, or to touch up your old acquaintances, whether they are contemplating anything of the kind [life insurance]. I talked to two or three": Record, p. 100, lines 7-11.

The whole of the evidence, as to these facts, given on behalf of the appellants, was the following: J. Irving Riddle, one of the appellants, testified: "I didn't tell him (Love) anything about the rule of the office": Record, p. 128, lines 2-3. And William

A. Hamilton, the other appellant, thus testified: "Don't remember any complaint about his not coming at 8 o'clock and 1 o'clock": Record, p. 174, 651 lines 21-22. "Do not know that we made any specific complaints": Record, p. 183.

Nowhere in the evidence are the foregoing statements of the appellee denied. The facts referred to by the court in the instructions were established by the uncontradicted testimony of the appellee, and the presumption of the correctness of the instructions is confirmed by an examination of the record.

The other points made in the petition for a rehearing were, as we think, correctly and fully decided in the original opinion.

The petition for a rehearing is overruled.

SERVICES—WRONGFUL DISCHARGE OF EMPLOYE—REMEDY—BREACH OF CONTRACT—DAMAGES.—The remedy of an employé, wrongfully discharged before the end of his term, where the contract of hiring is for a definite time, is: 1. To elect to treat the contract as rescinded, and sue on a quantum meruit; or 2. To sue for an entire breach of the contract by the defendant, and recover all damages sustained up to the trial; or 3. To wait until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. The measure of damages, in such cases, is the amount of wages he would have earned under the contract, after deducting such sums as he had earned, or, by the exercise of reasonable diligence, might have earned, in the line of his business during the remainder of the period covered by the contract: Note to *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 301; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319. This subject is discussed in the monographic note to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515-518, on the remedies of an employé wrongfully discharged.

INSTRUCTIONS—CONSIDERATION OF—PRESUMPTION.—If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it is good as part of a series containing the entire law of the case. All of the instructions must be considered together, and construed with reference to each other: *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200. If a charge, as a whole, is correct, the judgment will not be reversed, although an extract from the charge, taken by itself, is erroneous: Note to *State v. Ardoin*, 62 Am. St. Rep. 680. It will be presumed, on appeal, that the instructions given were applicable to the evidence: *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497, and note.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

WILLIAMS v. HARLAN.

[88 MARYLAND, 1.]

COTENANCY—LIEN FOR IMPROVEMENTS.—If a cotenant expends money in making improvements on the common estate, at the request of his cotenants and for their benefit, he is entitled to a lien therefor upon the shares of such cotenants.

COTENANCY—LIEN OF THIRD PERSON FOR IMPROVEMENTS.—If a third person lends money to a cotenant, to be expended in making permanent improvements on the common estate at the request of the other cotenants, and such improvements are made, the lender is subrogated to the rights of the borrowing cotenant and is entitled to a lien on the property for the amount so expended.

COTENANCY—ENFORCING LIEN FOR IMPROVEMENTS—PARTIES.—In an action to subject land held in cotenancy to a lien for improvements made thereon with money loaned by a third person, a cotenant, who has parted with all his interest to a trustee for creditors, is not a necessary party.

COTENANCY—LIEN FOR IMPROVEMENTS—INJUNCTION.—An action for an injunction may be maintained to restrain a contemplated partition of land held in cotenancy, whereby the lien of a third person for money loaned by him for improvements made on the common property by the cotenants may be destroyed.

W. A. Dawson and S. A. Williams, for the appellant.

J. J. Archer and W. B. Harlan, for the appellees.

² **FOWLER, J.** Certain real estate, consisting of a farm of one hundred and twenty acres and the buildings thereon, located in Harford county, Maryland, constitutes the subject of this controversy. By the will of the late Elizabeth B. Williams the farm in question was devised to her daughter, Maria B. Greenway, for life, with remainder in fee to her children. Mrs.

Greenway, the life tenant, died intestate in 1893, leaving four children, Mary, Elizabeth, William H., and Edward. The latter conveyed all his interest in the farm to his sister Mary, and William H. Greenway conveyed his interests in the same to the appellee, W. Beatty Harlan, in trust for the benefit of his creditors.

The bill in this case was filed in the circuit court for Harford county by the executor of the will of the late George Hawkins Williams, of Baltimore city, in his own behalf and in behalf of all other creditors of said William H. Greenway in like condition with himself. It alleges that the life tenant, Mrs. Greenway, and her two daughters and her son, William, being anxious to occupy the premises as a home and residence, and the same being without buildings or improvements of any ³ kind upon it, applied to the plaintiff's testator, who was the brother of Mrs. Greenway, to assist them in raising the necessary money to make the desired improvements. Being willing to aid them, but unwilling to assume the entire liability for the large amount of money requisite, he indorsed at their request five promissory notes of said William H. Greenway, amounting in the aggregate to the sum of eight thousand five hundred dollars, the whole of which has been paid, partly by the said testator, Williams, and the balance by the appellant, his executor. It is further alleged that the money so procured from, and in fact advanced by, said Williams and his executor, was used by the said William H. Greenway and his cotenants "with full knowledge on their part from whence the said money was derived, and that the same was simply a loan, in the erection of a dwelling-house, barn, stable, and other out-buildings" upon the land mentioned in the bill. The bill charges that the cotenants, Elizabeth W. and Mary B. Greenway and W. Beatty Harlan, trustee of William H. Greenway, intend and are about to make a specific partition of the said land by which the latter, as such trustee, is to have one-fourth of said one hundred and twenty acres, which partition, if consummated, will be, it is alleged, grossly inequitable to the plaintiff and to all the other creditors of said Greenway, as they will, by reason of such partition, "receive from said property a much smaller proportion of its value than the share of William H. Greenway, and will thereby suffer great loss." It is also distinctly alleged that the farm as a whole, together with the improvements thereon placed with the money advanced by the plaintiff and his testator, represents a larger value than the several parts thereof would realize if sold in smaller portions, at the

same time setting forth the facts upon which this allegation is based. In addition to this there is also an allegation that the land is not capable of partition in kind without loss and injury, accompanied with a claim on the part of the plaintiff that he is entitled to have the land sold as a unit, and an account taken of how and to what extent the same has been benefited by ⁴ the expenditures of the money advanced as we have described, and asking that the sum so ascertained, with the value of William H. Greenway's share in the land itself, may be paid over to his trustee, to be distributed according to law to the payment of his debts. An injunction is also prayed to restrain the defendants from attempting to make the alleged contemplated partition until the rights of the plaintiff and other creditors of said Greenway can be determined.

We have thus at length set forth the substantial averments of the bill, because the defendants demurred to it, and their demurrer was sustained. From the order of the court below sustaining the demurrer the plaintiff appealed.

The question presented is whether, on the facts set forth in the bill, the plaintiff is entitled to the relief prayed, namely, a sale of the whole property, together with the improvements, and to an ascertainment of the share of William H. Greenway as set forth in the bill, and also to the injunction as prayed.

It may be observed that the demurrer, as appears from the argument of counsel for the defendants, was based largely on a misconception of the theory of the bill. A sale is not asked by the plaintiff for the purpose of partition or division of the proceeds of sale, because the land is incapable of division without loss or injury, as was suggested, but the whole contention of the plaintiff now is, whatever may have been his contention in the court below, that he is entitled to have a sale so as to work out his equitable lien for the money alleged to have been advanced and used for the purpose of enhancing the value of the land. And, therefore, while it is true that the plaintiff would have no standing under the provisions of article 16, section 116 of the code, because he is neither a joint tenant, tenant in common, parcener, nor a concurrent owner, yet the question remains whether, under all the circumstances of this case, he has not an equitable lien on the land and improvements, and, if so, whether he may not work out such lien in the manner he is now attempting to do under this proceeding.

⁵ There can be no question that as between William H. Greenway and his cotenants he would be entitled to a lien for

the amount expended by him on improvements and repairs made upon the joint property with their knowledge, or at their request or in good faith for the benefit of all. This doctrine is fully settled by all the authorities. Mr. Pomeroy, in his *Equity Jurisprudence*, section 1239, says: "When two or more persons are joint owners of real or other property, and one of them, in good faith, for the joint benefit, makes repairs and improvements upon the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners with respect to their proportional shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors." To the same effect are 13 *Am. & Eng. Ency. of Law*, 602; *Green v. Putman*, 1 *Barb.* 500; *Hall v. Piddock*, 21 *N. J. Eq.* 311; *Gavin v. Carling*, 55 *Md.* 530.

But it is not the joint tenant or owner himself who in this case is claiming the benefit of the equitable lien; but it is his creditor who advanced the money which made it possible to make the improvements, and thereby create the enhanced value. It seems to us that this creditor has a strong equity as against these defendants. There is no question here as between the plaintiff and other creditors of the defendants or bona fide purchasers without notice of his equitable lien, but the claim is that, inasmuch as there is no such question involved, the plaintiff is entitled to be subrogated to the rights of William H. Greenway, who, as we have seen, beyond doubt has a lien on the land for the amount expended in improvements and repairs.

Bearing in mind that the money claimed by the plaintiff was practically loaned by the testator and his executor for the express purpose of erecting the dwelling-house and other buildings, with the full knowledge of all the defendants, we think a court of equity ought not to hesitate to recognize the right of the plaintiff to stand ^a in the shoes of the tenant in common, who, it is conceded, would have a lien if he were claiming it. He or his trustee, if he would make the claim, could enforce it against the other defendants, and if the trustee refuses or neglects to do so, this plaintiff, in his own behalf and for the benefit of other creditors, should be allowed to proceed under the bill filed in this case. Upon the notes or evidence of debt the insolvent would at law alone be responsible, and, unless the plaintiff can enforce his claim against the interest in the land of all the defendants, he would practically be deprived of any remedy

which would enable him to recover the money advanced for the benefit of all: *Perry v. Board of Missions*, 102 N. Y. 99. Judge Story says courts of equity have not confined "the doctrine of compensation or lien for repairs and improvements to cases of agreement and joint purchasers; but have extended it to other cases where the party making the repairs and improvements has acted bona fide and innocently, and there has been a substantial benefit conferred on the owner, so that, *ex aequo et bono*, he ought to pay for such benefit": *Story's Equity Jurisprudence*, sec. 1235. And again in section 1234 he says that this equitable lien "arises from contract express or implied between the parties, and sometimes it is created by courts of equity upon mere principles of general justice, especially where any relief is sought by the party who ought to pay his proportion of the money expended . . . for in such cases the maxim well applies, '*Nemo debet locupletari ex alterius incommodo.*'" We think these general principles so clearly expressed by Judge Story should be applied to the facts of the case before us, although it is true that neither the plaintiff nor his testator actually made the improvements: *Perry v. Board of Missions*, 102 N. Y. 99; *Gavin v. Carling*, 55 Md. 530. In the New York case just cited, the appellant had, at the request of the bishop of the diocese, loaned money to make certain improvements on church property. He filed a bill to have a lien declared in the nature of a mortgage upon the premises on which the improvements had been erected with the money he advanced. It was held that he was entitled to the lien, and it was said that, although he was not the vendor of the land, and could not, therefore, be said to have a vendor's lien, yet he added to the value of the land and his money fitted it for the purpose for which it was intended. "The plaintiff's case," said the court, "is within the general doctrine of equity which gives a right equivalent to a lien, when in no other way the right of the parties can be secured. The repairs and improvements were permanently beneficial to the property, made in good faith, with the knowledge and approbation of the parties interested and accepted by them. The plaintiff's right to remuneration is clear, and, unless the remedy sought for in this action is given, there will be a total failure of justice." In the case of *Gavin v. Carling*, 55 Md. 530, the same view was taken.

What we have said disposes of the controlling question raised by the demurrer. But it was further objected that the bill is defective: 1. For want of necessary parties; 2. Because the land

here involved is not sufficiently described; 3. Because the evidence of the indebtedness is not sufficiently set forth; and 4. Because the facts alleged do not make out a case for injunction.

These objections we will briefly consider. 1. All the parties having any interest in the land are made parties to this proceeding. William H. Greenway having conveyed his interest to his trustee, Mr. Harlan, is not interested in this controversy—except, perhaps, to see that the proceeds or his share thereof shall be properly applied to the payment of his debts. His trustee, being one of the defendants who it is alleged are about to consummate the alleged inequitable partition sought to be enjoined, could not, of course, be a plaintiff in this proceeding. 2 and 3. We think the land, as well as the evidence of the debt, are sufficiently described. However, these two last-mentioned grounds of demurrer are not included among the special grounds relied on below, and will not, therefore, be now considered: Code, art. 16, sec. 136.

The last objection suggested by the defendant is that the bill does not make a case for injunction. But if we ^s are correct in the conclusion we have already announced, that the plaintiff has an equitable lien which may be enforced under this bill, and that this lien will be destroyed by the alleged intended partition, there can be no question but that the injunction should issue. It would be useless to say the lien is good, and at the same time declare that it cannot be enforced. In the case of *Hall v. Pid-dock*, 21 N. J. Eq. 311, it was held that equity will restrain, at the instance of a tenant in common, partition proceedings commenced at law for an unequal division, such as this is alleged to be. As we have said before, this plaintiff, in order that justice may be done, should be subrogated to the rights of his immediate debtor, William H. Greenway, and especially to that right which we have seen is accorded to him by all the authorities, namely, the right to a lien and a sale to make it effective.

There is no question now before us as to the distribution of the fund sought to be created by the sale asked for by the bill, for the prayer is that the share of William H. Greenway may be paid to his trustee and be “distributed among the creditors of said Greenway in the manner prescribed by law.”

Order reversed with costs, and cause remanded.

COTENANCY—LIEN FOR IMPROVEMENTS.—The general rule is, that a tenant in common cannot charge either lands or cotenants for improvements on the common property: *Thurston v. Dickinson*, 2 Rich. Eq. 317, 46 Am. Dec. 56; *Ward v. Ward*, 40 W. Va. 611, 52

Am. St. Rep. 911. Where a tenant in common, with the express assent of his cotenant, improves the common property, he thereby acquires a lien on the interest of the latter for a proportionate share of the cost of the improvements: **Extended note to Robinson v. McDonald, 62 Am. Dec. 484.** As to when one cotenant has a lien on the moiety of another, see the extended note to **Flack v. Gosnell, 35 Am. St. Rep. 416.**

McELROY v. HANCOCK MUTUAL LIFE INSURANCE COMPANY

[88 MARYLAND, 137.]

INSURANCE—LIFE—RIGHT OF ASSIGNEE TO SUE.—One who holds the entire legal title to a life insurance policy by assignment, as well as a beneficial interest therein as legatee, and also an absolute interest in the proceeds of the policy to the extent of premiums paid by him for other beneficiaries, may maintain an action thereon in his own name, and the insurance company cannot defend on the ground that the plaintiff does not own the entire beneficial interest.

INSURANCE—LIFE—RIGHT OF TRUSTEE IN INSOLVENCY TO SUE.—The trustee of an insolvent assignee of a life insurance policy may maintain an action thereon when the insolvent holds the legal title and an equitable interest in the policy.

INSURANCE—LIFE—TIME OF FURNISHING PROOF OF DEATH.—A provision in a life insurance policy, that "notice of the claim and proof of death shall be submitted to the company within ninety days after the decease," does not defeat the claim of the beneficiary, when he does not know of the existence of the policy or of the death of the insured until more than a year thereafter, and he notifies the company at once after acquiring such knowledge.

INSURANCE—LIFE—WAIVER OF PROOF OF DEATH.—Failure to furnish proof of death within the time limited by a life insurance policy is waived, when the company makes a proposal to settle, or absolutely refuses to pay, or denies all liability, or asks for additional proof without making objection that the proof given was not furnished in time.

F. Gosnell and T. M. Lanahan, for the appellant.

S. J. Hannan and C. H. Knapp, for the appellee.

141 FOWLER, J. The John Hancock Mutual Life Insurance Company of Boston, Massachusetts, on the 23d of May, 1877, in consideration of the payment of an annual premium of one hundred and eighteen dollars, insured the life of Paul E. Dorsey in the sum of two thousand dollars for his own benefit. The policy was made subject to the laws of Massachusetts, which provide "that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease." On the 1st of June, 1877, the insured assigned the ¹⁴² policy to his

brother, Daniel Dorsey, of Baltimore, and the assignment was duly assented to by the company. Daniel Dorsey, the assignee, died in the year 1885, and in the same year, on the 14th of August, his will was admitted to probate in the orphans' court of Baltimore city. By this will he advised and bequeathed all the rest and residue of his estate to his son, Joseph Dorsey, and his daughter, Annie J. Dorsey, and to them in trust for his two grandchildren. The proportions of the estate devised to each and the particulars of the trust are not important to be considered here. It is sufficient to say that nowhere in the proceedings in the orphans' court as to the estate of Daniel Dorsey does it appear that the policy assigned to him was distributed or even mentioned in the inventory. The estate of Daniel Dorsey having been fully administered, and the executor, Joseph Dorsey, having passed his final account, he, as executor, assigned to himself individually the policy, with the assent of the company and also with the full consent of all the beneficiaries. It appears from the evidence that at the time of this transfer the two grandchildren being minors, and having no means with which to pay their share of the premiums, and the remaining person interested in the policy, Annie J. Dorsey, being also unable to pay her share of maintaining it, it was agreed by all the parties in interest that the assignment should be made to Joseph Dorsey, and that he should pay the premiums out of his own money, and that, upon the death of the assured, the proceeds of the policy were to be divided according to the respective interests. This assignment to Joseph Dorsey was fully ratified and adopted by the minors after they arrived at age. It is admitted that all the premiums were duly paid up to and including that due on 22d of May, 1894. The premium due the 22d of May, 1895, was not paid, but the payment of the premiums prior thereto, it is admitted, kept the policy in force until the 22d of May, 1896. The premiums paid by Joseph Dorsey with his own money amounted to one thousand and two dollars, and the whole amount of premiums actually paid is equal, or nearly so, ¹⁴³ to the face value of the policy. In 1891, Joseph Dorsey became insolvent, and the plaintiff, James W. McElroy, was appointed his permanent trustee in insolvency. Joseph Dorsey died in May, 1895, and, although his sister knew he had gone into insolvency, she took out letters on his estate in order to get at a box in the Safe Deposit Company which he and she, during his life, had held jointly, and she testifies that she attempted to collect the insurance claim because she supposed that was the

proper way to do it. However, this fact is of no importance, except to explain how it happened that she, as administratrix, and not the trustee in insolvency, took the initial steps to obtain payment of the policy, and furnished proof of death. The insured died at the Home of Incurables in the state of New York on the 19th of June, 1895; but this fact was unknown to Miss Dorsey for nearly a year, so that it was impossible for her to comply literally with the provision of the Massachusetts law which required proof of death to be given "within ninety days after the decease." But as soon as she received information of the death of the insured she notified the local agent of the company, and he sent her blanks for proof of death, which she filled up. These were objected to and returned to her, because they were not correct, and other blanks were sent to her by the company, and these were also filled up and sent to the company, in whose hands they have remained ever since. On the 16th of October, 1896, about four months after the proofs were furnished, a letter from the local agent in Baltimore was received by her containing the information that the company would recognize no claim under the policy, proofs not having been submitted in accordance with the Massachusetts statute applicable thereto, and that the company did not consider that she had any interest in the policy. Whereupon she consulted counsel, who appealed to the company to settle the claim without regard to technical objections. But this appeal was in vain. On the 3d of November, the company wrote counsel that it had nothing to add to its letter of October 16th to his client, and that there was ¹⁴⁴ no defect in the formal proofs. This correspondence was closed on the 24th of November, 1896, by a letter from the company saying that it had nothing further to say regarding the matter. Miss Dorsey, as administratrix of her brother, and as surviving trustee under her father's will, made another effort to collect the amount she considered justly due on the policy, and through the second attorney she consulted she ascertained that the plaintiff, James W. McElroy, was trustee in insolvency of her brother, and was the proper person to prosecute a suit for the recovery of the insurance money. The plaintiff testifies that in February, 1897, he became aware for the first time of the existence of the policy, and of the death of the insured; that this information came to his knowledge from Miss Dorsey's "visit to the office of his associate; that witness took up the matter, and, upon investigation, found that Joseph Dorsey had applied for the benefit of the insolvent law of this state in 1891, and that witness was

his trustee; that he put himself in communication promptly with the company." On the 9th of February, 1897, two days after learning the facts we have just stated, Mr. McElroy wrote to the local agent in Baltimore informing him that he had only recently learned of his interest in the policy, and asking him if the proofs of death furnished by Miss Dorsey as administratrix, et cetera, were in due form; and if not what was necessary to be done by him as trustee in order to collect the insurance money. The agent forwarded this letter to the company at Boston, and in a few days Mr. McElroy received a reply in which the company says: "You are correct that Miss Dorsey filed the papers to prove the claim under this policy and claimed the money. The papers in themselves we think are correct enough, but the company has decided not to recognize the claim under this policy, and Miss Dorsey has placed it in the hands of John H. Thomas, et cetera. We think it might be well for you to see Mr. Thomas, and see whether Miss Dorsey is intending to enter suit as intimated in his letter. Until this matter is settled we are unable to give you any definite information in regard to this case." ¹⁴⁵ Mr. McElroy replied that unless some satisfactory arrangement for settlement could be made he would enter suit. He was then informed for the first time by the company that according to the provisions of the Massachusetts statute, under which the policy was issued and continued in force, "there was, strictly speaking, no claim, the proof not having been filed within ninety days of death." But the company closed their letter with an offer to settle both the claim of the trustee and of the administratrix by the payment of the sum of six hundred and fifty-two dollars, declaring, however, that it was under no legal obligation to pay this sum.

This suit was brought in the usual form by the plaintiff, as trustee in insolvency of Joseph Dorsey, to recover the amount claimed to be due on the policy. The defendant pleaded the general issue.

We have stated the facts at length which were offered in evidence by the plaintiff, for the reason that at the close of his case the learned judge below instructed the jury "that under the pleadings in this case the plaintiff has produced no evidence legally sufficient to enable him to recover, because the undisputed evidence shows the trustee in insolvency has no such interest in the policy sued on as enables him to maintain this suit."

There are two other questions which, though not passed upon below, we will consider and dispose of, because they will neces-

sarily arise in a retrial of the case, and, if the contention of the defendant company be correct as to these other questions, it would be useless to order a new trial even though there may be error in other rulings of the court: *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 215.

The first of these questions is, Were the proofs of death under the circumstances of this case sent to the company in time? and second, If not, was there a waiver by the company of the requirement as to furnishing proof of death within ninety days after death?

The verdict and judgment were in favor of the defendant on the instruction of the court, and the plaintiff has appealed.

¹⁴⁶ 1. Has the plaintiff trustee such an interest in and title to the policy sued on as entitles him to bring this suit? It is manifest from the evidence we have fully stated that Joseph Dorsey, the plaintiff's insolvent, held the entire legal title to the policy. This he held under the assignment by himself as executor to himself in his own right. But he was also entitled absolutely as one of the residuary legatees under his father's will to an undivided fifth. In addition to holding the entire legal title by assignment and the beneficial interest as legatee, the insolvent was also entitled to an absolute interest in the proceeds of the policy to the extent of the premiums paid by him for the other beneficial owners of the policy. It is not important now to ascertain with exactness the extent of such interests of the insolvent, but it is sufficient that he had such substantial interests in the subject of controversy, and of this there is no doubt under all the evidence in the case, and the law applicable to it. Nor do we think there can be any doubt that the interests in, as well as the legal title to, the policy which were vested in the insolvent passed to the plaintiff as trustee under the operation of the insolvent law, for the benefit of his creditors. It was suggested that the interest of the insolvent in this policy passed to his administratrix. But this view is in conflict with what has been, from *Alexander v. Ghiselin*, 5 Gill 180, down to the most recent decisions of this court, declared to be the spirit and intent of our insolvency system, namely, that all of the estate of the insolvent should be administered in the insolvent court. And the fact that others may have either legal or equitable rights in or to the estate or property, the legal title to which is in the insolvent, will not prevent the insolvent court from adjudicating all questions that may arise, that court having full power to determine the legal and equitable rights of the parties:

Crocker v. Hopps, 78 Md. 265. But where the insolvent holds the bare legal title, without any beneficial interest whatever, his trustee cannot possibly take from him anything which is of any value to the creditors; ¹⁴⁷ and it may well be held that, under such circumstances, nothing, not even the legal title, passes to the trustee in insolvency. This distinction is drawn in Rhoades v. Blackiston, 106 Mass. 336, 8 Am. Rep. 332, where it is said: "If, however, the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title rests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time": See, also, Low v. Welch, 139 Mass. 33. The defendant has attempted to assail the validity of the assignment of the policy to the insolvent, and thus show that his trustee in insolvency has no better title. In order to do this, he contends that the evidence shows that some of those who assigned to the insolvent were infants, and that those infants and their aunt, Miss Dorsey, owned the larger part of the policy. But the evidence also shows that if the assignment was made by minors they ratified it fully after arriving at age. Nor do we think the evidence shows that the insolvent held merely as trustee. The remarks of Judge Dillon, who delivered the opinion of the court in Smith v. Missouri Valley Life Ins. Co., 4 Dill. 353, are particularly applicable to the position assumed by the defendant in this branch of the case. He said: "The company cannot set up such supposed rights in others to defeat an action on the policy. The wife, having the legal title, may maintain the action, and this will protect the company from another suit, and, in the event of recovery, the equities, if any exist, which I do not decide, can be adjusted in action between them and the plaintiff. The administrators of the husband are not here insisting upon their rights, if they have any, and the company cannot set up rights for them, and on its action introduce into this suit matters with which it has no concern."

The plaintiff, therefore, having the legal title to, and also a large beneficial interest in, the policy, he was the property party to bring this suit.

2. The second question we shall consider is whether, under all the circumstances of this case, the defendant can escape liability by the defense that the proofs of death were not furnished within ninety days after death?

¹⁴⁸ Whatever may be said in regard to the failure or negligence of the administratrix in not giving earlier notice and

proof of death, she having been the first of those interested in the policy to hear of the insured's death, it can hardly be said, we think, that the plaintiff was guilty of any negligence whatever in this respect. It appears that two days after he first heard that his insolvent held the policy, he promptly proceeded to inform the company of his rights, and to inquire if the proofs of death then already in its hands were in due form, and if not what was necessary for him to do as trustee, et cetera, in order to collect the proceeds of the policy for the insolvent estate of Joseph Dorsey. He was informed by the defendant that the papers (proof of death) were correct enough, but that the claim would not be recognized. No new or additional proofs of death were ever asked for from the plaintiff, but on the contrary he was informed that those which had been sent were correct. But very soon after its first letter to the plaintiff, the defendant told him that the proofs then in its hands had come too late. Of course, it was useless after that to attempt to supply any additional proof. Under these circumstances, and it appearing that the plaintiff never, until a few days before he made his claim, had any, the least information of the existence of the policy, nor any reason to induce him to make an investigation to discover if his insolvent had such an asset, can it be said either upon reason or authority that he or the creditors he represents should be bound by the ninety-day provision of the Massachusetts law? It is perfectly clear that the rule was made for the ordinary cases where the existence of the policy and the death of the insured are known or might or should be known in time to comply with the rule. It cannot reasonably be supposed that the holder of the policy could be required to give proof of a fact of which he was himself ignorant. "To decide that one was not duly diligent, and that he lost his right as beneficiary because he did not give notice of a policy of which he knew nothing, would be more strict and exigent than in our opinion the language of the policy requires. There ¹⁴⁹ was timely notice given after the fact of insurance came to the knowledge of the plaintiff. This delay in finding the policy was not strange and unexceptionable. On the contrary, it appears to have been entirely consistent with good faith": *Konrad v. Union Casualty etc. Co.*, 49 La. Ann. 636. See, also, *Globe Accident Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486; *Kentzler v. American Mut. etc. Assn.*, 88 Wis. 589, 43 Am. St. Rep. 934. In the case last cited, although the facts were different from those we are considering, yet the reasoning and the general prin-

ciples announced may well be applied here. The court said: "A contract should not be so construed as to defeat or render nugatory the rights of one of the parties to it, unless the language employed imperatively requires such construction. In other words, an interpretation which gives effect is preferred to one which makes void. Besides, a contract should be interpreted in view of the conditions necessarily implied by law." As we have already said, it would be unreasonable to require the plaintiff to have given the defendant notice or proof of facts of which he was ignorant, and which he could not have been reasonably expected to know before the day on which he received the information from Miss Dorsey.

3. But, independent of this view, we think there is ample evidence in this cause to establish a waiver by the defendant of the failure to send proofs of death within ninety days from the death of the insured.

The following grounds or any one of them have been declared to be sufficient to constitute a waiver of any defect in, or defense arising out of failure to duly give notice and proof of death: "A proposal to settle"; "an absolute refusal to pay on the merits"; "a denial of all liability"; "a negotiation with the insured, without making the objection of defective proof of death": Bliss on Life Insurance, sec. 268; Cooke on Life Insurance, 118. In its letter to the plaintiff the defendant said: "The papers in themselves are correct enough, but the company has decided not to recognize the claim under this policy." Not a word here to indicate that its refusal to pay the plaintiff was because of want of seasonable ¹⁵⁰ proof of death. On the contrary, the only reasonable inference to draw from this language is that, without reference to any objection based on the proof of death, it had some meritorious defense on which it intended to rely. But, again, the defendant made a direct proposal to settle the claims of both the plaintiff and the administratrix of the insolvent, by the payment of the sum of six hundred and fifty-two dollars: Caledonia Fire Ins. Co. v. Traub, 86 Md. 86. And, in addition to this, it may be fairly said that the defendant negotiated with the plaintiff without making the defense now relied on. It is true it subsequently relied upon this defense, but when it wrote the letter of the 15th of February to him, it neither directly nor indirectly placed its refusal to pay upon want of proper proof of death. The letter closed thus: "We think it might be well for you to see Mr. Thomas, and see whether Miss Dorsey is intending to enter suit as intimated in

his letter. Until that matter is settled we are unable to give you any definite information in regard to this case." The information asked for by the plaintiff was to know if the proofs of death sent by Miss Dorsey were in due form, and if not, what he should do to perfect his claim. If the defendant intended to rely upon the defense it now sets up it should have said so. But it not only refrained from saying anything on the subject, but promised to give definite information after the dispute with Miss Dorsey had been disposed of. Why promise to give definite or any information if this defense was to be relied on?

In May, 1896, Miss Dorsey sent proofs and they were returned to her for further information, and during the same month the additional proof was forwarded. On the 23d of June it was approved by the medical examiner of the company. In the case of *Hohn v. Interstate Casualty Co.*, 115 Mich. 79, the supreme court of Michigan said: "An insurer waived a condition requiring notice of the accident to be given within a certain time, when it wrote for further information": *Bliss on Life Insurance*, sec. 268; *Cooke on Life Insurance*, 118; *Merchants' Life Ins. Co. v. Gibbs*, 56 N. J. L. 679, 44 Am. St. Rep. 413. This ¹⁵¹ defendant retained the additional or corrected proof of death without objection from June until the 16th of October, some four months, when it wrote the letter of the latter date. This of itself constitutes a waiver of any objection to delay in sending proofs of death: *Jones v. Howard Ins. Co.*, 117 N. Y. 103.

Without prolonging this opinion by the citation of further authorities, our conclusion is that the judgment must be reversed.

Judgment reversed and new trial awarded.

INSURANCE—LIFE—RIGHT OF ASSIGNEE TO SUE.—The right of an assignee of a life insurance policy to sue upon the policy seems to turn upon the question as to whether such assignee has an insurable interest in the life of the insured. One line of authorities holds that the policy may be assigned in the same way as any other chose in action. The other line of authorities, which is supported by the better reasoning, holds that an assignee with no insurable interest, who has secured the policy during the lifetime of the insured, cannot recover: See the extended notes to *Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906; *Bursinger v. Bank of Watertown*, 58 Am. Rep. 352. See, also, *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335; *Prudential Ins. Co. v. Young*, 14 Ind. App. 560, 56 Am. St. Rep. 319.

INSURANCE—LIFE—WAIVER OF PROOF OF LOSS.—Waiver of preliminary proofs may be presumed in an action for insurance, if the insurers always refused to pay on some other ground, and had never objected on account of any defect or deficiency in the preliminary proofs: Note to *Lumbermen's Mut. Ins. Co. v. Bell*, 57 Am. St. Rep. 140; *Turner v. Fidelity etc. Co.*, 112 Mich. 425, 67 Am. St. Rep. 428.

SUPREME LODGE ORDER OF THE GOLDEN CHAIN v. SIMERING.

[88 MARYLAND, 276.]

ASSOCIATIONS—RIGHT OF REPRESENTATION.—If a statute provides that the number of members necessary to secure one representative in the supreme governing body of a fraternal benefit association shall be the unit of representation, and the number of times the membership in the state is greater than such unit is the number of representatives to which the state is entitled in the supreme body, and the constitution of such an association provides that there shall be one representative for the first five hundred members, that constitutes the unit of representation, and, if there are four thousand members in the state, the association is entitled to eight representatives in the supreme body, although, under other provisions of its constitution, it would be entitled to but two representatives for such membership, if the constitution and not the statute were to control.

ASSOCIATIONS—RIGHT TO VOTE—INJUNCTION.—If persons are regularly elected representatives in the governing body of a benefit association, and are then excluded from the right to vote by the existing officers, they are entitled to an injunction to restrain such exclusion.

ASSOCIATIONS—JURISDICTION OF EQUITY TO REMOVE OFFICERS.—Equity has no jurisdiction to remove officers of a benefit association, although illegally elected, nor to restrain them by injunction from exercising the powers of their offices.

ASSOCIATIONS—JURISDICTION OF EQUITY TO REMOVE OFFICERS.—Equity has no jurisdiction to determine the validity of an election of officers in a benefit association and to pronounce judgment of amotion. The title of the officers who are in office under color of an election, and who are, at most, irregularly chosen, cannot be inquired into in a suit in equity instituted to restrain them from exercising the functions of their offices, upon the ground of the irregularity of their election.

J. P. and E. A. Poe, for the appellants.

I. Rayner and A. C. Trippe, for the appellees.

282 BOYD, J. The Supreme Lodge, Order of the Golden Chain, of Baltimore city, one of the appellants, was incorporated in this state. Constitutions and by-laws were adopted for the government of the supreme and subordinate lodges of the order. Under the constitution, the Maryland members of the association were only entitled to two representatives in the Supreme Lodge, but in 1896 the legislature passed an act, known as chapter 331 of the laws of that year, which the appellees claim entitles them to a representation of eight. The appellants contend that the act is not applicable to this association and is void for uncertainty. The Supreme Lodge meets **283** biennially and in May, 1896, met at Atlanta, Georgia. Eight persons, in-

cluding the appellees, claimed to be the regularly elected representatives from this state, and demanded admission to the sessions of the Supreme Lodge held at Atlanta, but were refused, on the ground that Maryland was only entitled to two representatives, which number the Supreme Lodge offered to admit, but that offer was not accepted. The meetings, at which were the officers of the Supreme Lodge, several past supreme commanders, and one representative from each of the states of Virginia, Pennsylvania, Georgia and South Carolina, as well as one from New York, who was also an officer, lasted for several days, and on the last day the officers were elected by them—fifteen out of the twenty-three persons present being elected to office. Six of the representatives from Maryland shortly after their return filed this bill, and afterward another was made a party complainant. The bill alleges that the eight representatives were denied admittance to the Supreme Lodge in defiance of the laws of this state, and that the states of Georgia and Virginia were likewise denied the representation they were entitled to, and that the acts of the Supreme Lodge were illegal and void.

The court below decreed that the proceedings at the sessions at Atlanta, in refusing the complainants admission and denying them the right to vote in accordance with the act of 1896, were contrary to law and void, and restrained and enjoined the defendants, claiming to act as officers under that election, from exercising any powers claimed by them, by virtue of said election, and from excluding any state representatives properly qualified, in accordance with the act of 1896, from the right to vote at any of the sessions of the Supreme Lodge.

The appellants contend that a court of equity is without jurisdiction to grant the relief given and that the act of 1896 is void, but, if valid, does not apply to the defendant corporation. There was no fraud proven, except in so far as it may be inferred from the conduct of the members of the Supreme Lodge in excluding the ²⁸⁴ representatives and electing themselves to the offices. Amongst other prayers in the bill was one for the appointment of a receiver pendente lite, but that was abandoned.

When the question of jurisdiction is presented, we would ordinarily dispose of that before considering the other points. But, inasmuch as this decree not only enjoins the individual defendants from discharging the duties of their several offices, to which they claim to have been elected at the meeting in May, 1896, but also from excluding any state representatives, properly qualified under the act of 1896, from the right to vote at any of the

sessions of the Supreme Lodge, the jurisdiction of the court must be considered with reference to the two branches of the injunction thus granted, as the one is not necessarily disposed of by deciding the other. We will, therefore, first determine whether the act of 1896 is open to the objections urged by the appellants.

It is conceded that the appellant corporation is "a fraternal beneficiary association" and subject to the provisions of ch. 295 of the Laws of 1894, which added sections 143 E to 143 R, inclusive, to article 23 of the code. The act now before us added a section to be known as 143 E 1, to follow 143 E. Although it does not very clearly express all that it is evidently intended for, so far as the matters before us are involved, its meaning is sufficiently plain. Its primary object undoubtedly was to give subordinate organizations of such associations larger representations in the supreme bodies. By the express terms of section 143 E every fraternal beneficiary association is required to have a representative form of government, and, by the act of 1896, any association of the description set forth in section 143 E was authorized to continue business, provided it complied with that act (and other requirements of the laws of this state) in the supreme body, composed of state council, conclave, lodge, chapter, or district representatives, who are elected by the members of the association, "and others to the number of one-fourth or more of the entire membership of the supreme ²⁸⁵ body who are not so elected as representatives." From article 4 of the constitution we find that the supreme lodge of this association is composed of state representatives and other persons consisting of its officers, the chairman of the advisory board, past supreme commanders, and the originators and members of the supreme lodge at the date of institution who continue in good standing in the order. Those who are not state representatives comprise more than one-fourth of the entire membership of the supreme lodge, and hence it would seem that this association is within the very letter of the law. It is urged at length in the answer that it was excluded from the effects of it by reason of certain proceedings in the legislature when the bill was pending, but as the law, as passed, uses terms sufficiently comprehensive to include the supreme lodge of the defendant without in any way exempting it, we are not called upon to examine the terms of the bill as originally introduced, or the proceedings thereunder, but must construe the one that became a law. It is also contended that this act does not change the constitution of the defendant

association. It provides that "no member is qualified to vote unless he is a state, council, conclave, lodge, chapter, or district representative, elected by the members or their duly accredited delegates, and, in computing the number of representatives to which a state or district is entitled in such supreme body, the number of members that is necessary to secure one representative shall be considered the unit of representation and the number of times the membership in any state is greater than this unit of representation is the number of representatives, which the state is entitled to in the supreme body." The constitution of the defendant provides that each state is entitled to representatives in the supreme lodge as follows: "For the first five hundred members one representative; for the first fifteen hundred members, two representatives; for the first four thousand five hundred members three representatives," and for every five thousand members in excess of four thousand five hundred one additional representative. It is therefore argued that there is no fixed unit and no number ²⁸⁶ that can properly be called such unit. But the language of the statute is "the number of members that is necessary to secure one representative shall be considered the unit of representation." There can be no question as to what number was necessary under this constitution to secure one representative, and that number (five hundred in this association) is the unit of representation or basis of calculation. That unit is the divisor, the number of members in the state the dividend, and the quotient (excluding fractions) will be the number of representatives the state is entitled to. Nor is there any difficulty in ascertaining the source from which such unit can be determined. These associations are required by law to have "a representative form of government," and, if the charters do not prescribe the basis of representation, the constitutions or by-laws should do so. The statute leaves the several associations to fix the number necessary for one representative, but when that is done the law determines the whole number for each state or district according to the total membership in such state or district. Being, then, of opinion that the act of 1896 does apply to the defendant association, and it being shown that there are four thousand members in Maryland, it follows that they were entitled to eight representatives in the supreme lodge and not two, as contended by the appellants. The members of the supreme lodge not only did not admit the eight representatives as required by the statute, but they totally disregarded it and elected fifteen of their own number to office. This was

contrary to the express provision of the law that provides that "no member is qualified to vote unless he is a . . . representative elected by the members or their duly accredited delegates." So far as the proceedings of the sessions at Atlanta show there was apparently not even a quorum, for this statute says "a majority of the elected representatives shall constitute a quorum." Unless the self-constituted members of the supreme lodge are to have a monopoly of the offices and an unlimited control of the association, it would seem that there must and ought to be some remedy for the members. The question then ²⁸⁷ is whether the appellees have sought such as the law will afford them.

That a court of equity has power to enjoin the individual defendants, who are members of the supreme lodge, from excluding any properly qualified state representatives from the right to vote at any sessions of the supreme lodge we have no doubt. They hold the offices of supreme commander, vice supreme commander, past supreme commander, supreme secretary, supreme treasurer, supreme medical examiner and chairman of the advisory board, which are the principal offices of the association. All of them were present at the meeting in Atlanta and took part in the proceedings, refusing to admit the representatives from Maryland, Virginia, and Georgia, in accordance with the act of 1896, and by their answer still deny that these members have the right of representation, which we have determined they have. The appellees are not seeking the aid of a court of equity to place them in office. They have not been elected to such offices and do not claim them, but as members and state representatives of the association, they have the right to the aid of a court of equity to prohibit these officers, who have thus refused and still refuse to permit those entitled to take part in the deliberations and acts of this important body, from excluding them from the right to vote. This branch of the case is clearly within the meaning and reasoning of the decisions in *Campbell v. Poultney*, 6 Gill & J. 94, 26 Am. Dec. 559, *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350, and *Webb v. Ridgely*, 38 Md. 364. It was useless for the appellees to make further appeal for relief to the supreme lodge, and, although ordinarily the rights and interests of a corporation must be asserted by the corporation itself, yet stockholders or members, when there is no stock, can proceed under such circumstances as these against those in control of the corporation, which the members of the supreme lodge are, in this association. Many cases could be

cited to sustain a proceeding of this character under such circumstances as we have related, but it is not necessary to refer to those outside of this state, as our own cases are sufficient. ²⁸⁸ See, in addition to those above cited, *Davis v. Gemmell*, 70 Md. 356; *Shaw v. Davis*, 78 Md. 316. And, in *Mason v. Supreme Council etc.*, 77 Md. 486, 39 Am. St. Rep. 433, it was said: "If the officers of the order should be guilty of misconduct, fraud, or mismanagement, a court of equity has full power to restrain and enjoin them." Whatever the motives of these individual defendants were, their action resulted in not only excluding those that were entitled to be in the supreme lodge, but in securing for themselves control over the association and lucrative positions, which they may not have had if the representatives elected by the members had been permitted to vote.

Nor do we think that the act of 1894, chapter 295, in anywise interferes with the right of the appellees to this part of the decree. What is said of that act in the case of *Barton v. Fraternal Alliance*, 85 Md. 14, makes it unnecessary for us to discuss it in this connection, as its meaning and scope are there so clearly stated. There may be some question whether this branch of the injunction that was decreed is embraced in the prayer for that writ, but if there be any defect in that respect it is cured by section 177 of article 16 of the code as construed in the case of *County Commrs. v. School Commrs.*, 77 Md. 291. We are, therefore, of the opinion that the court had jurisdiction to pass the portion of the decree we have been considering, and to that extent it must be affirmed.

But it was also decreed "that the defendants claiming to act as officers of the Supreme Lodge, Order of the Golden Chain, by virtue of such election, are hereby restrained and enjoined from exercising any powers claimed by them by virtue of said election." That presents the question in a different light from what we have been discussing. The practical effect of that part of the decree is the removal of those defendants from the offices to which they claim they were elected. Whilst it is undoubtedly true that a court of equity has power to enjoin or otherwise decree against officers of a private corporation, guilty of fraud, misconduct, mismanagement or some act that is ultra vires, or that would seriously ²⁸⁹ affect the rights of the stockholders or members, we have, after a very diligent search, failed to find any authority that will justify it in not only passing on the validity vel non of an election of officers, but in removing them, without some special or statutory authority. It is true that it is held

that, in proceedings over which equity has jurisdiction for some other purpose, if the right to an office or the regularity of an election must be decided in order to give the relief which equity can properly afford, the court has the power to inquire into and determine the validity of the election for the purposes of the suit. Such, for example, are *Johnston v. Jones*, 23 N. J. Eq. 216, and *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236, and it might be said we have practically done that in the other branch of this case. Even in that class of cases it is held that a court of equity cannot go further and remove an officer from an office of which he is in possession, or declare the office forfeited. But, in this branch of this case, as presented to us by the record, there is no other cause shown for a court of equity to interfere, but the controversy is purely and simply whether it can remove officers, declared elected, in a proceeding instituted for that purpose and not arising incidentally in a matter over which equity admittedly has control.

In 1 Thompson on Corporations, section 754, it is said: "A court of equity has no authority to determine the validity of an election of the officers of a private corporation and pronounce judgment of amotion. The title of directors who are in office under color of an election, and who are, at most, irregularly chosen, cannot be inquired into in a suit in equity instituted to restrain them from exercising the functions of their offices, upon the ground of the irregularity in their election." To the same effect are 17 Ency. of Law, 52; *Johnson v. Jones*, 23 N. J. Eq. 216; *Mosely v. Alston*, 1 Phill. Ch. 790; *Hughes v. Parker*, 20 N. H. 58. In High on Injunctions, first edition, section 774, it is said: "Nor will a court of equity, at the suit of stockholders of a corporation, restrain its officers from the exercise of their functions, since such restraint would ²⁰⁰ be equivalent to removal from office, and over such a subject equity has no jurisdiction." See, also, third edition of the same work, section 1235, where the subject is more fully discussed. None of the Maryland cases cited go to the extent we are asked to go in this case. It is true they have sustained the right of stockholders to enjoin proposed illegal or fraudulent methods in the conduct of election of officers, but none of them have decided or intimated that this power can be used after an election, although irregular or even illegal, to remove those declared elected, or, what is equivalent to that, to prohibit them from exercising the powers vested in them by virtue of such election.

It is said in behalf of the appellees that this is not a contest

between them and the individual appellants for the offices held by the latter, and hence, mandamus, the proceeding authorized in this state for such purposes, will not answer. But, while it is true they are not asking to be placed in office by this proceeding, they are attempting to oust the appellants, or do what in some respects might have worse results, to prevent them from discharging the duties of the several offices. The application for receiver was abandoned, and, if these officers be prohibited from acting, it would necessarily, for the time being, if not permanently, stop the regular business of the corporation; for, if they cannot act there are no others that can, and unless these offices are filled the affairs of the association cannot be conducted as contemplated by its constitution and by-laws. The court has no power to appoint officers in their stead, and to prohibit these from acting would probably result in the ruin of the association, which might be disastrous to the members, especially the older and delicate ones. The supreme treasurer could neither receive nor pay out money, and the supreme commander could not even call a special meeting, as provided by the constitution, nor could he discharge any of the other important duties devolved on him, and so with the other officers. It may be said that the old officers would hold over, but some of them are the same persons—the treasurer, secretary, ²⁹¹ medical examiner, and chairman of the advisory board were re-elected to the same positions, and each of the other officers occupied some position before the election at Atlanta. It would, indeed, be difficult for any of them, especially those who have been re-elected to the same offices, to act without violating the spirit of the injunction, but, if they could, it would be of little service to the appellees if a court of equity issued process that would result in the parties who were enjoined being permitted to continue in office by virtue of former elections. There is not even any evidence of mismanagement or misconduct in office on the part of these persons, excepting in so far as their action at the Atlanta meeting reflects on that.

If a court of equity assumes jurisdiction, at the instance of a few members of an association in such cases, where will it end? Is every irregularity in the election of officers to be made the foundation for proceeding in equity? It may be true that this is a more serious one than may often occur, but where is the line to be drawn? There is no evidence in this case of any intentional violation of law, for the record shows that the appellants acted under advice of a learned and prominent member of this

bar, who advised them that the law did not apply. In that opinion we do not concur with him, but there is nothing in the record to justify the inference that either he or the defendants did not act in good faith.

It is also said that the appellees and other members of the association are without remedy, if a court of equity will not grant this relief. But we cannot agree to that. We have already said they could enjoin the members of the supreme lodge from refusing to let them vote, and they might have gone further and enjoined those who were not representatives from voting at all. But they could have adopted still easier and simpler methods. The accredited representatives of the members could have organized, elected officers and then, by application for mandamus, those so elected could have tested the right to the offices, or possibly a mandamus to compel the members of the supreme ²⁹² lodge to admit the representatives would have answered. Other methods suggest themselves which might have been sufficient (although we do not feel called upon to so determine in this case), such as applying for a mandamus to compel the proper officers of the supreme lodge to call another meeting to hold an election on the ground that no valid election had been held.

So, although we are of opinion that the act of 1896 does apply to the defendant corporation, and is valid, we must reverse that part of the decree that enjoins the individual defendants from performing the duties of the offices to which they claim to have been respectively elected. We will not assume that after the law has been construed by this court these parties will act in defiance of it, but, if they do, there is ample remedy provided for such cases.

Decree affirmed in part and reversed in part and cause remanded, each side to pay their own costs.

ASSOCIATIONS—JURISDICTION OF COURTS OVER.—The foundation of the jurisdiction of a court of equity over voluntary associations seems to be based upon the protection of the right of property of members. Even in the case of the improper expulsion of a member, the jurisdiction of a court of equity to interfere is not because he is deprived of his membership, but because of the right of property of which he is deprived; and it follows that, if there is no right of property affected, a member has no standing in court: Extended notes to *Otto v. Journeymen Tailors' etc. Union*, 7 Am. St. Rep. 163; *Austin v. Searing*, 69 Am. Dec. 677. A member cannot complain of a decision by the association, or by a tribunal provided for by its laws, suspending or expelling him, or denying his claim to benefits or property, nor have the courts juris-

diction to interfere, where the association or tribunal has acted under its rules, unless it appears that the rules themselves were invalid, or that the decision was not in good faith, or was made without notice and an opportunity to be heard: *Extended notes to Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 164; *Austin v. Searing*, 69 Am. Dec. 672. See, also, *Huston v. Reutlinger*, 91 Ky. 333, 34 Am. St. Rep. 225.

FLACH v. GOTTSCHALK COMPANY.

[88 MARYLAND, 368.]

CONTRACTS OF A LUNATIC who has not been found by an inquisition to be insane are not absolutely void, but merely voidable.

CONTRACTS OF LUNATICS.—A contract made with a lunatic, fairly and in good faith, when the other party is ignorant of the disability, cannot be repudiated by the lunatic after he has had the benefit of it, unless both parties, upon a rescission, can be restored to the situation they originally occupied.

CONTRACTS OF LUNATICS—NOTICE.—An inquisition of lunacy is notice, actual or constructive, to all parties dealing with the lunatic, and after such inquisition a contract made with the lunatic is void and unenforceable.

CONTRACTS OF LUNATICS—COMPETENCY OF AGENT AS WITNESS.—If a contract is made between an agent on behalf of his corporation and a person subsequently declared insane, such agent is not a party to the contract and is competent as a witness in an action thereon, although the statute provides that one party to a contract is incompetent to testify if the other party thereto is insane.

APPELLATE PRACTICE—REVIEWING ADMISSION OF EVIDENCE.—The admission of evidence subject to exception cannot be reviewed on appeal unless an exception is taken to the overruling of a subsequent motion to exclude such evidence.

B. F. Horwitz and R. D. Coe, for the appellant.

M. Lehmayr, for the appellee.

370 McSHERRY, C. J. There are two questions brought up by the record in this case—the one as to the sufficiency of a replication to which the appellant demurred, and the other as to the admissibility of evidence. The replication raises the question as to a lunatic's liability on his contract, and that particular question, as now presented, has not hitherto been distinctly considered and settled in Maryland.

The suit was brought in April, 1896, by the appellee against the appellant to recover the price of two barrels of whiskey sold by the former to the latter in 1894. The appellant was adjudged a lunatic in May, 1896. The declaration contains the ordinary money counts. In addition to the general issue plea,

the defendant pleaded that at the time the purchase was made he was, and ever since has been, a lunatic. To this plea the plaintiff replied first, with a traverse, and, secondly, by a replication alleging that the merchandise sued for had been sold and delivered for its fair value, and had been sold and delivered when the plaintiff was unaware of the lunacy of the defendant; that the contract sued on was fair and reasonable, that the defendant had the benefit thereof, and that the parties cannot now be placed in the same situation they occupied before the goods were sold and delivered. This replication was demurred to; the demurrer was overruled, and issue was finally joined. The first error complained of is this ruling on the demurrer.

Speaking generally, the contracts of a lunatic, who has not been found by an inquisition to be insane, do not belong to the class that are absolutely void, but fall within the group that is described as voidable. This is ³⁷¹ certainly the law in Maryland: *Key v. Davis*, 1 Md. 32; *Chew v. Bank of Baltimore*, 14 Md. 319; *Riley v. Carter*, 76 Md. 595, 35 Am. St. Rep. 443. Whilst his contracts, with some exceptions, are only voidable, it does not follow that they can always and under any circumstances be avoided and annulled by him. There are conditions which fasten upon him the obligation of some of his contracts as completely as though they were the undertakings of a perfectly sane individual. At a very early date—as long ago as the time of Littleton—it was apparently the prevailing doctrine that “no man of full age shall be received in any plea by the law to stultify and disable his own person”: Littleton, sec. 405. And so, in *Beverley’s case*, 4 Coke, 123, the court of kings’ bench held “that every deed, feoffment, or grant which any man non compos mentis makes is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself.” As a consequence, though the crown in some cases could, and in other cases persons who claimed under a lunatic might, set up his disability, the individual himself was not permitted to do so. But this rule was subsequently relaxed, and, in fact, the directly opposite position was assumed. Thus, the old writ of *dum fuit non compos mentis* lay to recover back land which had been aliened by a person not in his right mind: *Fitzherbert’s Natura Brevium*, 202; and it was held that a lunatic could not suffer a recovery: *Hume v. Burton*, 1 Ridg. App. 16; nor execute a deed: *Yates v. Boen*, 2 Strange, 1104; nor a bond: *Faulder v. Silk*, 3 Camp. 126; nor indorse a bill of

exchange: *Alcock v. Alcock*, 3 Man. & G. 268. And so it was held that a family settlement made by a lunatic ought to be set aside, although it was reasonable and for the convenience of the family: *Clerk v. Clerk*, 2 Vern. 312. Sir W. Scott in *Turner v. Meyers*, 1 Hagg. Const. 414, stated: "It is, I conceive, perfectly clear in law that a party may come forward to maintain his own past incapacity; and, also, that a defect of incapacity invalidates the contract of marriage as well as any other contract." ³⁷² This broad rule which supplanted the ancient contrary doctrine was itself afterward qualified and restricted, and certain exceptions were engrafted on it. Thus, a fine levied by a person non compos mentis was held to be good: *Thompson v. Leech*, 3 Mod. 305; and the reason was that the act is of a public and notorious character, done in a court of record, and that the court had the power of judging of the sanity of the party. And so a feoffment by a lunatic: *Thompson v. Leech*, Carth. 435. Another exception—if exception it can be called, because it depends upon a wholly different principle—arises where necessities are supplied to a lunatic; and these are excepted from the general rule on the ground that they do not require a consenting mind. But the qualification of the rule did not stop with these three exceptions, for Pollock, C. B., in *Molton v. Camroux*, 2 Ex. 487, affirmed in 4 Ex. 17, observed that unsoundness of mind would now be a good defense to an action upon a contract if it could be shown that the defendant was not of capacity to contract, "and the plaintiff knew it." In support of this view the chief baron cited *Browne v. Joddrell*, 1 Moody & M. 105; *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170; *Dane v. Viscountess Kirknall*, 8 Car. & P. 679. In *Beavan v. McDonnell*, 9 Ex. 309, it appeared that the plaintiff entered into a written contract for the purchase of certain land at a specified price from certain persons, vendors thereof on behalf of the defendant, on the terms and conditions that the plaintiff should pay a sum of four hundred and fifteen pounds as a deposit on the purchase, et cetera, and that if the plaintiff should neglect to comply with the conditions on his part the deposit should be forfeited to the vendors. The plaintiff paid the deposit. At the time he entered into the contract the plaintiff was a lunatic and incapable of understanding its nature; but this the defendant did not know, and the contract was on his part a bona fide one. The lunatic sued to recover back the deposit. The defendant, by plea, alleged that the money had been received under the contract; and the plaintiff replied that

when the contract was made and the money was paid under it, he was a lunatic and incapable ³⁷³ of contracting, and that the contract was not of any benefit to him; and he averred that the defendant had notice of this. The defendant rejoined that neither the vendors nor the defendant, when the plaintiff made the contract or paid the money, "knew that he was a lunatic, or of unsound mind, and incapable by reason of unsoundness of understanding the meaning of a contract, but made the said contract with him fairly and in good faith, believing that he was able to understand the same." This rejoinder was demurred to, but was held to be a good rejoinder. The question—and the precise question—involved in the case at bar, was thus decided adversely to the lunatic in *Beavan v. McDonnell*, 9 Ex. 309. In *Elliott v. Ince*, 4 De Gex. M. & G. 475, Lord Chancellor Cranworth spoke of the decision in *Molton v. Camroux*, 2 Ex. 487, as a decision of necessity, and he observed that a contrary doctrine would render all ordinary dealings between man and man unsafe. "How is a shopkeeper," asked his Lordship, "who sells his goods, to know whether a customer is or not of sound mind? Perhaps," he continued, "the same principle may apply to sales of land or mortgages. Lord Truro seems to have thought it would; so, at least, I collect from what he says in *Price v. Berrington*," 3 Man. & G. 498. And the more recent case of the *Imperial Loan Co. v. Stone* (1892), 1 Q. B. 599, is equally emphatic. Sir Frederick Pollock in his valuable work on Contracts, sixth edition, page 89, states that: "The rule is now settled, however, that the contract of a lunatic or drunken man, who, by reason of lunacy or drunkenness, is not capable of understanding its terms or forming a rational judgment of its effects on his interests, is not void, but only voidable at his option; and this only if his state is known to the other party." Not only is this the settled and accepted law of England, but the same principle may be regarded as prevailing in this country: 11 Am. & Eng. Ency. of Law, 136.

If the contract be fair and bona fide, and there is no element of fraud or imposition in it, and if the other party does not know of the insanity, and the parties cannot ³⁷⁴ be placed in the position they occupied before the contract was executed by the sane party, there is no reason why the lunatic should be allowed to retain what he has acquired under the contract and at the same time be permitted to escape from all liability arising out of it. Though the question now before us was not involved in *Chew v. Bank of Baltimore*, 14 Md. 319, this court, in deal-

ing with that case, recognized the principle which must control this; for on the page just mentioned the court says: "There are cases where the courts have declined to interfere. In these, however, as far as we have examined, the lunatic had had the benefit of the contract, and relief was refused, because of lapse of time, the changed condition of the property, or other circumstances, and especially where the party appeared to be sane."

Whatever may have been the reasons which induced the courts to hold that a contract made under the conditions set forth in the replication to which the defendant demurred was binding, the effect has been to restore the original doctrine fixing a liability upon the lunatic when there has been, at the time the contract was made, no judicial ascertainment of his lunacy, and when the contract is fair and bona fide, unless the other party to the contract knew at the time it was entered into that the lunacy existed. The liability of the lunatic under these circumstances rests not only on authority but upon sound and satisfactory principles.

As the lunatic's contract at best is only voidable, it would be unjust and inequitable to allow him to repudiate it if it had been made fairly and in good faith, when the other party was ignorant of the disability, unless both parties, upon a rescission of it, can be restored to the situation they originally occupied. A successful repudiation of such a contract would inflict injury upon an innocent person who had been guilty of no default, whilst the lunatic would reap the benefit accruing under the contract. If it be assumed that both parties to such a contract are equally innocent—and that is the legal signification of the replication now under consideration—³⁷⁵ then the familiar rule that, when loss must fall on one or the other of them, it must be borne by the one who occasioned it, has a direct application; and the lunatic who causes the loss must be made to bear the consequences of his infirmity as he must bear his misfortune. The concession of the demurrer is that the contract was a fair one; that it was bona fide; that the goods sold were delivered to the defendant; that he had the benefit of the contract; that it was made in ignorance of the appellant's mental disability, and that the parties cannot be placed in the situation they occupied before the contract was made and executed on the part of the appellee. Obviously, then, if a merely voidable contract can be repudiated by one of the parties, even though he be a lunatic, and a recovery can be defeated in the face of these circumstances simply because the party who made the

purchase was of unsound mind, though not at the time adjudged to be so, the loss would fall upon a confessedly innocent person, instead of on the one who received and used the articles delivered in good faith under the contract. This would be manifestly inequitable. The principle which holds the lunatic liable under these conditions has long been acted on in equity: *Neill v. Morley*, 9 Ves. 478; 3 Pomeroy's Equity Jurisprudence, sec. 946; *Price v. Berrington*, 3 Macn. & G. 486. It has also been said that such a contract is enforced against the party non compos mentis, not so much upon the idea that it possesses the legal essential of consent, but rather because, by means of an apparent contract, he has secured an advantage or benefit, which cannot be restored to the other party, and therefore it would be inequitable to permit him, or those in privity with him, to repudiate it: *Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788; *Lincoln v. Buckmaster*, 32 Vt. 652; *Matthiessen v. McMahon*, 38 N. J. L. 536.

Of course, if such a contract were absolutely and unconditionally void, the ignorance of the other party as to the lunacy could not convert the disability into an ability—could not make that valid which was wholly invalid. But, if the contract be only voidable, it would ³⁷⁶ be palpably unjust to allow the lunatic to reap the benefit derived under it, and then to avoid all liability, to the prejudice of the other no less innocent party. There are, undoubtedly, cases which hold the contrary view, but the precise question now involved has never been ruled in Maryland before. The inconvenience which it is supposed may result from this doctrine can easily be averted by a formal inquisition of lunacy. Such an inquisition would furnish notice—actual in some instances, constructive in others, but in both a sufficient notice—of the lunacy; and this would preclude an averment that the party dealing with the lunatic was ignorant of the latter's mental incapacity. Whilst it is true, as insisted by the appellant, that this court in *Chew v. Bank of Baltimore*, 14 Md. 319, declined to adopt that line of English cases which hold a lunatic liable on his contracts unless fraud or imposition had been practiced, still in the very same case of *Chew v. Bank of Baltimore*, 14 Md. 319, it was conceded in the opinion that the courts in other cases had refused to interfere where the lunatic had had the benefit of the contract, and "especially where the party appeared to be sane." The decision striking down the transfer of bank stock was founded on the distinct ground that those considerations did not apply. "The case does not show that Chew

received one cent for the stock," though the stock belonged to him. It was not a case where the lunatic obtained any benefit from the transaction, or where the officers of the bank could or did contend that Chew appeared to be sane, for they neither saw nor dealt with him at all. We hold then, for the reasons we have given, that there was no error in the ruling on the demurrer.

The exception presenting the other question—the admissibility of certain evidence—sets forth that the plaintiff, a body corporate, produced as a witness Max Honig, who proved that he was a director and stockholder of the plaintiff company, as well as a salesman therefor. Thereupon the defendant objected to the competency of the witness because the defendant—the other party to the contract—was insane. The court admitted the ³⁷⁷ evidence subject to exception. No motion was made afterward to exclude the testimony, but an exception was reserved. The objection to the competency of the witness is founded on section 2, article 35 of the code. Amongst other things, that section declares one party to a contract or cause of action incompetent to testify if the other party thereto be a lunatic or insane. There are two grounds upon which the ruling can be sustained: 1. It is quite clear that the incapacity to testify imposed by the statute is imposed upon the sane party, to the contract or cause of action. If one of the parties to the contract or the cause of action be insane, then the other party to that contract or cause of action shall not be allowed to testify. But Max Honig was not a party to the contract or cause of action. The parties to the contract were the corporation and the appellant. Honig was the salesman. The precise question has been settled by this court in *South Baltimore Co. v. Muhlbach*, 69 Md. 395, the situation of the parties being reversed. In that case, the contract was made by the plaintiff with a director and agent of the company. The director died, and it was objected that the plaintiff was, in consequence, incompetent to give testimony. It was there held: "The rule of exclusion would, of course, have to be mutual in its operation, if the objection of the defendant were maintainable, and as nearly all contracts by corporations or associations are made by agents, if the death of the other contracting party rendered the agent incompetent as a witness, a great many persons would be rendered incompetent who were competent, or who could have been made competent, before the passage of the evidence acts. Such a result would contravene both the letter and the spirit of the acts which were intended

to extend and in no manner to restrict the competency of persons to testify": See *City Bank of Baltimore v. Bateman*, 7 Har. & J. 104. 2. The evidence of Honig was admitted subject to exception. There was, therefore, no definite or final decision by the trial court as to the admissibility of the evidence. This course is frequently adopted to facilitate trials and to enable the ³⁷⁸ court more fully to understand than it is possible to do at the moment the bearing of the evidence upon the issues. But admitting evidence subject to exception is not a ruling that can be brought up by bill of exception or in any other way. The evidence is merely admitted conditionally. The objecting party is at liberty to move later on that it be excluded, and from a refusal by the court to grant such a motion an exception will lie. This is the settled practice: *Basshor v. Forbes*, 36 Md. 164.

There being no errors in the rulings excepted to, the judgment, which was in favor of the plaintiff, will be affirmed.

Judgment affirmed, with costs above and below.

APPELLATE PRACTICE.—AN OBJECTION TO THE ADMISSION OF EVIDENCE not made on the trial cannot be urged on appeal for the first time: *State v. Myers*, 70 Minn. 179, 68 Am. St. Rep. 521; *Howard v. State*, 37 Tex. Crim. Rep. 494, 66 Am. St. Rep. 812.

Insane Persons—Contracts of.

Although some of the authorities maintain that a contract made with a lunatic, or person of unsound mind, before or after he has officially been declared insane, is absolutely void under all circumstances, the majority of the cases establish, as a general rule, that the contract of a lunatic made before an inquisition has declared him insane is not absolutely void, but merely voidable, and must, to be inoperative, be disaffirmed by him, his guardian, or committee. The authorities assert, however, that insane persons are incapable of entering into valid contracts, and that any agreements made by them are, as a general rule, either void or voidable: *Van Deusen v. Sweet*, 51 N. Y. 378; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *George v. St. Louis etc. R. R. Co.*, 34 Ark. 613; *Curtis v. Brownell*, 42 Mich. 165.

In order to invalidate an agreement, it must be shown that it was the direct result of the insanity alleged. The mere fact of delusion, if unconnected with the act under judicial consideration, is not sufficient to relieve the person attempting to set it up as a ground of disability. *Pidcock v. Potter*, 68 Pa. St. 348, 8 Am. Rep. 181; *Benolst v. Murrin*, 58 Mo. 307; *Wetter v. Habersham*, 60 Ga. 194; note to *People v. Herbert*, 63 Am. St. Rep. 94.

As before mentioned, with certain exceptions to be hereafter noted, an agreement of an insane person immediately connected with and growing out of his insanity is voidable and not void:

Copenrath v. Klenby, 83 Ind. 18; Louisville etc. Ry. Co. v. Herr, 135 Ind. 591; Crouse v. Holman, 19 Ind. 30; Boyer v. Berryman, 123 Ind. 451; Jackson v. Gumaer, 2 Cow. 552; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Pearson v. Cox, 71 Tex. 246, 10 Am. St. Rep. 740. To impeach the contract because of the insanity of a party to it, the mental weakness must have been such that the party was incapable of understanding what he was doing or comprehending the terms, scope, and effect of his contract: Sands v. Potter, 165 Ill. 397, 56 Am. St. Rep. 253.

If the insanity of a party to a contract is known, the contract is absolutely void, because lunatics or insane persons are incapable, for want of capacity, to enter into a valid contract, or to do any valid act, and all persons dealing with them, with knowledge of their incapacity, are regarded as perpetrating a fraud upon them, and courts of equity will set aside contracts made with such insane persons on the ground of fraud: Helberg v. Schumann, 150 Ill. 12, 41 Am. St. Rep. 339; Fecel v. Guinault, 32 La. Ann. 91.

Contracts made with a lunatic, or person of unsound mind, after inquisition and confirmation thereof, or after the appointment of a guardian, are absolutely void as to all of the parties: Hughes v. Jones, 16 N. Y. 67, 15 Am. St. Rep. 386; Rannells v. Gerner, 80 Mo. 474; Lamoreux v. Crosby, 2 Paige, 422, 22 Am. Dec. 655; Pearl v. McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199. Thus, a contract for the sale of real estate, executed by a person who has been judicially found to be a lunatic, and of whose person and estate a guardian has been appointed, is absolutely void, and no action can be maintained thereon by the guardian: Fitzhugh v. Wilcox, 12 Barb. 235. Contracts made with lunatics, or persons of unsound mind, before office found, but within the period overreached by the finding of the jury of inquisition, are not utterly void, but are presumed to be so until capacity to contract is shown by satisfactory evidence: Hughes v. Jones, 116 N. Y. 67, 15 Am. St. Rep. 386.

In some jurisdictions, it is held, contrary to the general rule, that a contract by an insane person, whether executory or executed, is utterly void, even where there has been no judicial determination of the fact of insanity: American Trust etc. Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167; Edwards v. Davenport, 4 McCrary, 34; Owing's case, 1 Bland. Ch. 370, 17 Am. Dec. 311; Lee v. Lee, 4 McCord, 183, 17 Am. Dec. 722; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Hanley v. National Loan etc. Co., 44 W. Va. 450. It has also been held that if one contracts with a lunatic he cannot recover of the lunatic therefor even though he in good faith supposed him to be sane, provided the circumstances known to him in regard to the other's mental condition were such as to convince a reasonable man of his insanity, or even to put him on inquiry by which he might, if reasonably prudent, have learned that fact: Lincoln v. Buckmaster, 32 Vt. 652.

The distinction between a proceeding to commit an insane person

to an asylum or hospital for his safekeeping and treatment, and a proceeding looking to the appointment of a guardian for him, on the ground that he is not competent to deal with his estate, must at all times be remembered. A person may be insane to an extent that he ought to be committed to an asylum, either for treatment, or for the purpose of preventing his doing harm to himself or others, and yet he may be sane in many respects, and competent to make wills, transfers of property, and contracts, when they are not dominated by any insane delusion to which he is subject, and, hence, though statutes are in force declaring the contracts and other acts of an insane person to be void after his insanity has been judicially determined until there shall be another judicial determination evidencing his restoration to capacity, his commitment to an insane asylum, even though as the result of a quasi-judicial determination, does not bring him within the purview of such statutes. In truth, in most states, such a commitment is not even *prima facie* evidence of his incapacity to contract, and whether it be *prima facie* evidence or not, there is no doubt that evidence may be received, notwithstanding such commitment, to show that he is competent to make a contract, or commence an action, or do any other act which may properly be done by a sane person or by a person who, though not wholly sane, is not incapacitated from doing the act in question: *Kellogg v. Cochran*, 87 Cal. 192; *Aldrich v. Superior Court*, 120 Cal. 142; *Legatte v. Clark*, 111 Mass. 308; *Knox v. Haug*, 48 Minn. 58; *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Imhoff v. Witmarsh*, 31 Pa. St. 243.

Contracts for Necessaries supplied to an insane person in good faith, and suitable to his rank in life or condition, may be enforced against him or his guardian: *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *Fitzgerald v. Reed*, 9 Smedes & M. 94; *Richardson v. Strong*, 13 Ired. 106, 55 Am. Dec. 430; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610. A lunatic incapable of managing his own affairs may make a contract for necessaries, including such things as are useful and proper to his station in life. He may make a contract with an attorney to have a guardian appointed for his protection, and such attorney can recover a reasonable fee for the value of his services rendered in procuring the appointment of the guardian, and for money expended for costs. *Darby v. Cabanne*, 1 Mo. App. 126. And an insane person is liable for goods innocently furnished him or his order, if no undue advantage or fraud on him is shown: *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573. An executed contract of a person non compos mentis for necessaries supplied in good faith, stands on the same footing as an infant's contract for necessaries: *La Rue v. Gilkysen*, 4 Pa. St. 375, 45 Am. Dec. 700.

Contracts made Without Notice of Lunacy.—If a person in good faith enters into a contract with another, who is, in fact, a lunatic, but ap-

parently sane at the time, and the contract is executed and an adequate consideration paid, which cannot be or is not restored by the lunatic or those who represent him, so as to put the parties in statu quo, the contract cannot be set aside by the lunatic or his guardian. Thus, in *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, it was held that, where land is conveyed by an insane person before an inquisition and finding of lunacy for a fair and reasonable consideration in good faith, without knowledge of the insanity or any advantage taken by the purchaser, the conveyance cannot be avoided if the consideration has not been returned, and no offer has been made to return it. And, again, in *Burnham v. Kidwell*, 113 Ill. 425, it was held that where land is bought of an idiot before his idiocy is adjudged, in good faith by the purchaser, or money is loaned to him, in good faith, and he secures its payment by mortgage, and the proceeds of the sale or loan are expended in behalf of him and about his care and support, the deed or mortgage cannot be avoided until the money so received by the idiot is returned or offered to be returned.

If goods are sold to a person apparently of sound mind, who is not known by the seller to be insane, and who has not been so found in a proper proceeding for that purpose, and the contract is fair, and bona fide, and the purchaser receives and uses the goods, whereby the contract becomes so executed that the parties cannot be placed in statu quo, such contract cannot afterward be set aside because of the unsoundness of the mind of such purchaser at the time of the sale, nor can payment for the goods be avoided, either by the alleged lunatic or his representative: *Wilder v. Weakley*, 34 Ind. 181. The general rule that controls all cases of this kind is, that the contract of a lunatic made before office found will not be set aside where it is entered into in good faith by the other party, without fraud or imposition, for a valuable consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original position, or there has been no restoration or offer to restore, or a refusal to restore: *Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788; *More v. Calkins*, 85 Cal. 177; *Ronan v. Bluhm*, 173 Ill. 277; *Strodger v. Southern Granite Co.*, 99 Ga. 595; *Abbott v. Creal*, 56 Iowa, 175; *Alexander v. Haskins*, 68 Iowa, 73; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *Sims v. McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Harrison v. Otley*, 101 Iowa, 652.

Where an executed contract has been made in good faith, for a valuable consideration, and without notice of the insanity, with a person who is of unsound mind, but before an inquisition and finding of lunacy, the latter must elect within a reasonable time after regaining his mental capacity whether he will affirm or disaffirm the contract, and if he elects to do the latter he must return the consideration which he has received: *Morris v. Great Northern Ry. Co.*, 67 Minn. 74.

A contract cannot be avoided on the ground that one of the parties thereto was insane when it was executed, free from fraud or undue influence, and made upon an adequate consideration, unless such insanity was of such character that he had no reasonable perception or understanding of the nature and terms of the contract: *Elwood v. O'Brien*, 105 Iowa, 239. If the contract is fair and reasonable, the fact that at the time it was made one of the parties thereto was losing, and to a great extent had lost, his capacity to attend to business and manage his affairs through loss of his mental faculties, and that this condition continued until he was judicially declared insane, does not entitle the lunatic to avoid the contract on the ground of his lunacy: *Stockmeyer v. Tobin*, 139 U. S. 176.

The general rule is, that, in order to justify the setting aside of a contract of an insane person not under guardianship, it must appear that the contract was made with knowledge of such incapacity, or with such information in regard thereto as would cause a prudent person to apprehend such infirmity. Proof of insanity at the time of the contract, in the absence of fraud, or knowledge of the insane person's condition, does not justify the setting aside of the contract, although the guardian of the lunatic offers to refund all moneys paid out thereunder: *Rhoades v. Fuller*, 139 Mo. 179; and even in those jurisdictions where the contract of a lunatic is deemed void, it is maintained that if one enters, in good faith, into a contract with a lunatic, without a knowledge of his lunacy, and, in pursuance of the contract, renders him important services, whereby he is benefited, though the contract is void, yet the party rendering the services is entitled to reasonable compensation: *Ballard v. McKenna*, 4 Rich. Eq. 358.

Contracts Entered Into During Lucid Intervals of one who is a lunatic are valid: *Lilly v. Waggoner*, 27 Ill. 395; *Jones v. Perkins*, 5 B. Mon. 222. If an intermission of the malady is shown at the time that the contract is entered into, the act is valid, and the habitual insanity of the party will not affect it: *Lee v. Lee*, 4 McCord, 183, 17 Am. Dec. 722; and an act done during a lucid interval by one who has been found to be a lunatic is binding on him where the proof of the lucid interval is clear: *Gangwere's Estate*, 14 Pa. St. 417, 53 Am. Dec. 554. A contract made by a person while he is of sound mind may be enforced against him when he is insane or of unsound mind. *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614; *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743; *Baldrick v. Garvey*, 66 Iowa, 14.

If one, while his reason is temporarily dethroned, enters into a contract or executes a release, and, after regaining his mental faculties, knowingly takes the benefit of his contract, he thereby ratifies and gives it force and effect: *Gibson v. Western N. Y. etc. R. R. Co.*, 164 Pa. St. 142, 44 Am. St. Rep. 586; *Louisville etc. Ry. Co. v. Herr*, 135 Ind. 591. In *Ellars v. Mossbarger*, 9 Ill. App. 122, it was shown that insanity existed both before and after the execution of a note, so near to that event as to leave but very few hours for a lucid interval to have intervened, and the peculiar character of the mania

was such as to have led the maker of the note to do the very act, in a moment of insanity, which it was insisted he did or ratified in a lucid interval. It was held that the maker of the note was not a free or responsible agent, and that the note must be held void: *Ellars v. Mossbarger*, 9 Ill. App. 122. If a note payable in a bank, given upon an unexecuted consideration, to one who knows of the maker's disability through insanity, passes into the hands of an innocent purchaser, it may be disaffirmed by the lunatic or his guardian: *McClain v. Davis*, 77 Ind. 419; *Taylor v. Dudley*, 5 Dana, 308. But, if one in good faith takes a note signed by a person of whose incompetency to do business he has no notice, and in a transaction which is not likely to call his attention to it, he can recover on the note: *Shoulders v. Allen*, 51 Mich. 529. It has been held, however, that a person of unsound mind, who signs as surety on a note given for an antecedent debt, cannot be held liable thereon, even if the person taking the note had no notice that the surety was insane: *Van Patton v. Beals*, 46 Iowa, 62.

A *Chattel Mortgage* made by an insane person, apparently sane and not judicially pronounced insane, vests title, and, after default, the right of possession is in the innocent mortgagee, and the chattels cannot be recovered without disaffirmance of the mortgage, and restoration of the consideration: *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; and in *Creekmore v. Baxter*, 121 N. C. 31, it was held that where a person has taken a mortgage from a person known to him to be insane, he can only recover upon a disaffirmance of the mortgage such benefits as the mortgagor has actually received from the loan. The court laid down the rule that "Idiots, lunatics, and persons otherwise non compos mentis being incompetent to enter into any valid contract, every person who deals with them, knowing their incapacity, is deemed to perpetrate fraud upon them and their rights, and equity will set aside such contracts upon the ground of fraud, charging the lunatic with only such benefits as he actually received from the transaction": *Creekmore v. Baxter*, 121 N. C. 31.

Deeds.—As to whether a deed executed by an insane person before he has been so adjudged is absolutely void or merely voidable, there is great conflict in the authorities, as will be shown hereafter, but, if a person has been adjudged insane by a judicial proceeding, a deed thereafter executed by him is absolutely void: *Brown v. Miles*, 61 Hun, 453; *Rhoades v. Fuller*, 130 Mo. 179; *Walt v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Griswold v. Butler*, 3 Conn. 227. The deed of a lunatic made while actually under legal and subsisting guardianship is absolutely void: *Elston v. Jasper*, 45 Tex. 409. And an insane grantor whose insanity is known to the grantee at the time of the grant, and who has not ratified his conveyance after restoration to reason, may avoid the conveyance without restitution: *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766.

A number of authorities maintain that an insane grantor's deed

executed before inquisition of lunacy is not merely voidable, but is absolutely void: *Rogers v. Blackwell*, 49 Mich. 192; *Griswold v. Butler*, 3 Conn. 227; *Van Deusen v. Sweet*, 51 N. Y. 378; *Estate of Desilver*, 5 Rawle, 111, 28 Am. Dec. 645. It has been held that a lunatic's deed is absolutely void, not only as to third persons, but also as to the grantor, and that the grantee therein is not entitled to restoration of the purchase money or compensation for improvements when the lunatic sues by his guardian to recover the land: *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. If a deed of an insane grantor is absolutely void, a bona fide purchaser from the grantee takes no title, and the fact that the insane grantor received and used the consideration for his support and maintenance creates no equity to which a bona fide purchaser from the grantee can be subrogated: *German Sav. etc. Soc. v. De Lashmutt*, 67 Fed. Rep. 399. The deed of an insane person may be avoided as against his grantee without notice, and as against an innocent purchaser from such grantee without restoration of the consideration paid by the last purchaser: *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468. The right of an insane person to avoid his deed is an absolute and paramount right, superior to all equities of other persons, and may be exercised against bona fide purchasers from the grantee: *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705.

In an action to recover real property claimed under a deed made by a lunatic, the fact of the incapacity of the grantor may be shown to defeat such claim, although no fraud is alleged, and such incapacity had not been legally or judicially determined at the time of or prior to the execution of the deed: *Van Deusen v. Sweet*, 51 N. Y. 378; *Rogers v. Blackwell*, 49 Mich. 192. But, assuming that a deed executed by an insane person is not voidable merely, but absolutely void, to establish its invalidity it must appear that the grantor was at the time he executed it, wholly, absolutely, and completely unable to understand or comprehend the nature of the transaction: *Aldrich v. Bailey*, 132 N. Y. 85.

The rule deducible from the weight of authority is, that the deed of a lunatic, executed before an inquisition and finding of lunacy, if taken in good faith, is voidable only and not void: *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Mohr v. Tulip*, 40 Wis. 66; *Elston v. Jasper*, 45 Tex. 409; *Nichol v. Thomas*, 53 Ind. 42; *Somers v. Pumphrey*, 24 Ind. 231; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744; *Cates v. Woodson*, 2 Dana, 452; *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84. The deed of a person non compos mentis is voidable: *Walt v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Bensell v. Chancellor*, 5 Whart. 371, 34 Am. Dec. 561. The deed of a person of unsound mind, made before office found, to one who has no knowledge of the grantor's incapacity, is only voidable, and, in order to avoid it, the consideration received must be tendered to the grantee: *Boyer v. Berryman*, 123 Ind. 451.

The lunatic, on being restored to his right mind, must surrender the price, if paid, or the contract for its payment, if unpaid: *Arnold v. Richmond Iron Works*, 1 Gray, 434. The deed of an insane person whose incompetency has not been adjudicated is not void, and cannot be avoided in an action of ejectment, nor otherwise than by a suit in equity, in which the insane grantor is required to do equity: *Moran v. Moran*, 106 Mich. 8, 58 Am. St. Rep. 462. A deed entered into by an insane grantor who has not been placed under guardianship is not absolutely void, but only voidable, and, if taken in good faith, and no advantage has been taken, it will be upheld: *Rhoades v. Fuller*, 139 Mo. 179. A deed executed by an insane person of apparently sound mind, before office found, is not void, but merely voidable, and vests the title in the grantee, subject to the right of the grantor, upon the restoration of his reason, or of his guardian, to affirm or disaffirm the deed: *Nichol v. Thomas*, 53 Ind. 42; *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744. If a lunatic executes a deed, and, after being restored to his right mind, and knowing that his grantee is in possession of the land under the deed, does not enter thereon, nor give notice of his intention to disaffirm the conveyance, but receives payment of the notes for the price given to him while insane, his intention to ratify and confirm the deed may be inferred, although at the time of receiving payment he does not know that he has a right to disaffirm the deed, and that by receiving payment he relinquishes such right: *Arnold v. Richmond Iron Works*, 1 Gray, 434.

A mortgage or conveyance of land, made in good faith, and for a fair consideration, by an insane person to one who has no notice of the insanity, and before any finding of lunacy, cannot necessarily be annulled by a mere showing of incapacity, and, before such conveyance can be set aside, the equitable rights of the grantee must be protected: *Myers v. Knabe*, 51 Kan. 720. Equity will not cancel the deed of an insane grantor if the grantee gained no inequitable advantage, cannot be placed in statu quo, and had no notice of the insanity, and the sale was fair and equitable: *Schaps v. Lehner*, 54 Minn. 208. The deed of an insane person is voidable only, but while he is under guardianship he is conclusively presumed incompetent to make a valid deed, though he is in fact sane at the time he attempts to do so. If, however, at the time he attempts to make the deed he is, in fact, of sound mind, and the contract is fair, and the guardianship has been practically abandoned, the deed is valid, though the guardian has not been formally discharged by the court: *Thorpe v. Hanscom*, 64 Minn. 201. The deed of lunatic not under guardianship is not void as against an innocent purchaser for value in good faith, and without knowledge of the incapacity of the grantor, and such deed will not be set aside, even though the grantee therein knew of the grantor's mental incapacity, if no fraud was practiced on the latter, and the deed was made under the advice of his counsel, for a fair and full consideration, and the transaction was to the ad-

vantage of the grantor and his family: *Odom v. Riddick*, 104 N. C. 515, 17 Am. St. Rep. 686. In *Brown v. Miles*, 61 Hun, 453, it appeared that a lunatic, before being declared such, executed a written agreement to convey certain land to a purchaser, who thereupon paid the consideration, went into possession, and made improvements upon the premises. After being adjudged a lunatic, such insane person and his wife executed a deed in pursuance of such agreement. In an action by the guardian of the lunatic in ejectment to recover the land, no offer was made to restore to the purchaser the consideration paid by him, or to pay for the improvements and it was held that, in the absence of proof of fraud, or that the lunatic was such when he entered into the written agreement, or want of good faith in the purchaser, the latter might justify his possession, and that if the deed could not stand he was entitled to a decree either for specific performance of the agreement, or a return of the consideration paid therefor: *Brown v. Miles*, 61 Hun, 453. A deed, by an insane husband, of a homestead, executed by him and his wife, is voidable only and not void, and, if the wife seek to avoid it, she must pay back the consideration received thereunder: *Pearson v. Cox*, 71 Tex. 246, 10 Am. St. Rep. 740. But, if a deed to a homestead is made by an insane person and his wife, or his wife and his guardian without an order of court, after he has been duly adjudged insane and placed under guardianship, such deed is absolutely void, though executed while the lunatic was at liberty on a temporary leave of absence, after having been confined in an insane asylum. Such deed conveys no title to the purchaser and his mortgagee, with actual notice of such insanity, and the adjudication thereof acquires no lien on the land: *New England Loan etc. Co. v. Spittler*, 54 Kan. 560.

MAYOR AND CITY COUNCIL OF BALTIMORE v. COWEN.

[88 MARYLAND, 447.]

RAILROAD COMPANIES—OPENING STREETS ACROSS TRACKS.—In a proceeding by a city against a railway company to condemn a part of its track for the extension of a public street over or across such track, the judgment of condemnation does not take the land itself, or the exclusive use thereof, but the city acquires only a right of way, subject to the right of way of the railway company.

RAILROAD COMPANIES—CONSTRUCTION OF STREET OR SEWER ACROSS RAILWAY TRACK—COMPENSATION FOR STRUCTURAL CHANGES.—If a new street or sewer is laid out and opened across an existing railway track, the railway company is entitled to compensation from the city for the cost of making and maintaining such structural changes in its roadbed and track as become necessary in order to protect and preserve the track for its former use. Such cost is not consequential but direct damage, as an invasion of the actual property rights of the company.

RAILROAD COMPANIES—GUARDS AT CROSSINGS—COMPENSATION FOR STRUCTURAL CHANGES.—Cattleguards,

crossing gates, the maintenance of flagmen, ringing of bells, and other things ordinarily required at railway crossings in populous communities, are matter of public safety, and within the police power, and when the duty to construct or maintain them has been imposed on the railway company by statute, no compensation therefor can be recovered. But this does not affect or qualify the rule that structural changes in the roadbed, made necessary by a new street or sewer crossing the track, must be paid for by the municipality opening such street or constructing such sewer.

J. V. L. Findlay, city counselor, for the appellant.

W. I. Cross, H. P. Preston, and H. L. Bend, Jr., for the appellee.

⁴⁵⁰ McSHERRY, C. J. This suit was instituted by the receivers of the Baltimore and Ohio Railroad Company to recover from the mayor and city council of Baltimore the expenses which plaintiffs incurred in consequence of the construction of a sewer by the city under a portion of the railroad company's tracks. There is no dispute about the facts. From 1861 until the present time the company has held by a prescriptive right, if by no other title, the actual possession of a lot of ground about sixty-six by sixty-six feet in size. Whether this adverse possession gave the company a fee simple estate in the lot, or merely an easement—a right of way over it—is for the purposes of this case immaterial. The lot is situated in the bed of what is now Scott street, within the city limits. Upon the lot four tracks of the railway are located at right angles to the line of the street. These tracks have been thus located and have been continuously used by the company, certainly since 1861, and probably for a much longer period. By ordinance No. 9 of 1884-85, the mayor and city council provided for the opening of Scott street. The street crosses the tracks at grade. The usual proceedings were had. The return and plat made by the commissioners for opening streets show that the lot above alluded to, and described in the street opening proceedings as lot B, was dealt with as follows: "To the Consolidated Gas Light Company of Baltimore, or ⁴⁵¹ to such person or persons as may be legally entitled thereto, for damages to the fee simple interest in all that ground" designated on the plat by the letter B, "the aforesaid piece or parcel of ground being subject to the right of way of the Baltimore and Ohio Railroad, 000." It seems to have been assumed that the title to the lot was in the gas company; and it is apparent that no condemnation was made of the interest of the railroad company in this lot, because the only condemnation affecting the lot

was specifically and in explicit terms a condemnation subject to the right of way of the Baltimore and Ohio Railroad Company. Whatever else was condemned, obviously the right of way of the railroad company was not condemned or attempted to be condemned. The right remained as perfect and unimpaired after the condemnation as it had been before; and, consequently, the easement which the company undeniably possessed was not acquired or interfered with by the city at all. The city, therefore, succeeded to none of the rights of the company in this easement and obtained no authority or semblance of authority to disturb or to interrupt the company's accustomed use of it. If this be not so, then the reservation in the condemnation proceeding is utterly meaningless and unintelligible. If, notwithstanding the failure to award any damages to the supposed owner of the fee, the city still acquired the servient estate in this lot under the condemnation, it only acquired it subject to the express reservation of the company's dominant easement. In a proceeding by the city against a railway company to condemn a part of its track for the extension of a public street over or across such track, a judgment of condemnation, no matter in what language couched, will not take the land itself, or the exclusive use thereof, but the city will acquire only a joint right with the railway company to the use of the land condemned. The use by the public will be, as a matter of fact, subject and subordinate: *Illinois Cent. R. R. Co. v. Chicago*, 141 Ill. 586; 8 Am. & Eng. Ency. of Law, 2d ed., 379. This dominant estate is property. If a mere right of way, it is no less property, for a right ⁴⁵² of way is the right held by the company in the land over which its road runs for railroad purposes: 19 Am. & Eng. Ency. of Law, 839. This property the city never sought or attempted to obtain. These respective estates of the company and the city in this lot being thus distinctly separate, the mayor and city council, on April 17, 1895, passed ordinance No. 35, providing for the construction of a sewer along and under the bed of Scott street. The elevation of the sewer, which passes under the railroad tracks on this lot at a right angle to the tracks, was such that it was necessary that the arch of the structure should be flat and without sufficient curvature to give it the strength required to support the weight of the heavy trains passing over it; and so the engineer of the company prepared plans for carrying the railroad over the sewer; and these plans included the strengthening of the side walls of the sewer and fitting them for use as abutments to sustain steel girders which were laid

thereon to support the tracks. In addition to furnishing and putting in position the steel girders, the work done by the railroad company in consequence of the construction of the sewer consisted of the digging of trenches on both sides of the sewer, placing supports or false work in those trenches and laying beams across so that the earth or core could be excavated without interrupting the running of trains; and besides this it became necessary to raise the tracks on either side of the sewer for some distance because of the elevation of the sewer. The total cost of the work done and the materials furnished by the company was four thousand eight hundred and sixty-nine dollars and twelve cents.

Some sixty or seventy feet west of Scott street the railroad tracks cross Chatsworth run on an iron bridge. This run was originally an open stream, but later on parts of its bed in another section of the city had been converted into a city sewer: *Kranz v. Mayor etc. of Baltimore*, 64 Md. 491. After the sewer along Scott street was finished, the water in that part of Chatsworth run, which was still an open stream and which was near the ⁴⁵³ intersection of Scott street and the railroad tracks, was turned into the artificial sewer, and the channel of the run was partially filled up. These facts are now alluded to as they bear upon one of the defenses relied on by the city.

When the evidence on both sides was closed the defendant asked ten instructions, all of which were refused; and in lieu of those requested by the plaintiffs the learned trial judge gave one prepared by himself. From these rulings the single bill of exceptions found in the record was taken. The verdict and judgment were against the city, and it has appealed.

The ascertainment of the respective rights of the city and the company in these intersecting ways—the street and the railroad bed—and a clear perception of the correlative and consequent duties incumbent on each of the parties, will solve the fundamental inquiry in this controversy; and the solution of that inquiry will indicate with but little further discussion the proper disposition to be made of the other questions raised by the rejected prayers.

It appears without dispute or contention that for at least thirty-seven years the railroad company has been in the open, continuous, undisturbed, and unchallenged possession of a right of way for the tracks of its main line over this lot, with little or no variation in their alignment, claiming ownership, occupying and using the land for the movement and passage of numer-

ous trains. That this long, notorious, and adverse user ripened into a vested right many years before the ordinance to open Scott street was passed cannot be and has not been denied. This was a property right, perfect and complete, owned and actually possessed by the railroad company prior to the time that the city took the first step under the ordinance just alluded to. Nothing that was done in virtue of that ordinance, or in the execution of its provisions, abridged or extinguished or impaired that property right in the most remote degree. As a consequence, when the city came to construct its sewer under that right of way, it was bound to construct ⁴⁵⁴ it in such a manner as not to interfere with or injure the dominant right of the company. "At common law, it is undoubtedly the rule that where a new way or road is made across another which is already in existence and use, the crossing must not only be made with as little injury as possible to the old road or way, but whatever structures are necessary for such crossings must be erected and maintained at the expense of the party under whose authority and direction they are made. And if the old road or way cannot be crossed without damage to it, and the right to cross is given, such damage must be assessed and paid. This principle is recognized as settled law in many well-considered cases": Northern Cent. Ry. Co. v. Mayor etc., 46 Md. 445, 446. In the very recent case of Chicago etc. Ry. Co. v. Milwaukee, 97 Wis. 418, the same doctrine is thus stated ("Where a new highway is laid out and opened across a railway track, the railway company is entitled to compensation for the diminished value of its easement in the land on account of the establishment of the new way, and the cost of making and maintaining such structural changes in its roadbed and track as become necessary in order to protect and preserve its track for the old use, notwithstanding the new use, except, however, such changes as are required by law under the police power of the state or the constitutional reservation of power to alter or amend corporate charters.") See, also, in addition to the cases cited, Northern Cent. Ry. Co. v. Mayor etc., 46 Md. 445; Kansas Cent. R. R. Co. v. Commissioners of Jackson Co., 45 Kan. 716; In re First Street, 66 Mich. 55; Central R. R. Co. v. Bayonne, 51 N. J. L. 428; 6 Am. & Eng. Ency. of Law, 2d ed., 554. In Central R. R. Co. v. Bayonne, 51 N. J. L. 428, a street was opened across the railway company's property at a point where there were five lines of tracks and two switches, and a ditch for the drainage of water along each side of the railroad. It became necessary to move the switches to another lo-

cality and to construct culverts in place of the ditches to preserve the waterway, and to lay planking between the tracks so as to protect the rails from injury. "These consequences will flow," says the court, "directly and inevitably ⁴⁵⁵ from the taking of such an interest in the property of the prosecutor (the railroad company) as will be required for the proposed highway." "According to these views, it seems plain that the removal of the switches, the planking of the roadbed, the construction of culverts, and the erection of the signboard, are necessary items of expenditure, against which the prosecutor should be indemnified." (Cattle-guards, crossing gates, the maintenance of flagmen, ringing of bells, and other things ordinarily required at railway crossings, especially in populous communities (and according to some, though not all of the cases, signboards or warning posts) are matters pertaining to the public safety, and are within the police power; and when the duty to construct them has been imposed on the railway company by statute no compensation for erecting or maintaining them can be recovered. But this does not affect or qualify the doctrine that structural changes made necessary by the street crossing the railroad must be paid for by the municipality.)

It must be borne in mind that the compensation claimed by the railroad company is claimed for the damages it sustained in consequence of the construction by the city of the sewer under the tracks—in consequence, therefore, of an actual invasion of the company's right of way and not for mere consequential damages. The sewer is a part of the street, and that portion of it beneath the tracks, being necessary for the use of all the rest of it, was a structure which the city was required to build in crossing the company's right of way. The building of the sewer being, then, a part of the construction of the street, and the right to cross the railroad tracks—the old right of way with the street—the new way—being a right explicitly subject to the existence and the continuous use of the prior easement that had not been condemned, the duty to construct the crossing was incumbent on the city; and if, in the discharge of that duty, it caused the railroad company injury in the way already pointed out and to the extent sued for, it is bound to make compensation. This conclusion is ⁴⁵⁶ inevitable, and we do not understand it to be disputed if the principle applied in *Northern Cent. Ry. Co. v. Mayor etc.*, 46 Md. 445, has reference to the case at bar.

But it was vigorously contended in the argument that the decision in the case just referred to had no relation to this case; and it was insisted that the city was not liable at all, because what it did in the construction of the sewer and in the opening of Scott street was done in the exercise of its governmental functions. And the doctrine was invoked that a municipal corporation is not liable in an action for consequential damages to private property or persons (unless made so by statute) when the act complained of was done by its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or skill in the execution of the power. In support of this there were cited the well-known cases in which it has been held that an abutting proprietor cannot recover from the municipality the consequential damages he has sustained by a change in the grade of a public highway; and it was argued that it was impossible to distinguish between an injury that leaves a house so high up or so low down by a change in the grade of a street as to make it inaccessible, and an injury whereby a right of way is temporarily disturbed, so far as the consequential nature of the damages is concerned. But it is precisely because there is a distinction between the class of cases just alluded to and the group to which the one at bar belongs that the former are inapplicable to the decision of the latter. The distinction is this: In cases like the pending one, where an existing way is crossed by a new way, and the prior way cannot be crossed without the infliction of injury, the damages must be paid by those who construct the new road. In cases of the other class there is no occupation by the municipality of the individual's property or easement. There is just, then, the distinction that exists between the occupancy and the nonoccupancy of another's property. If the municipality occupies in opening and maintaining its street the private property—the right of way ⁴⁵⁷ of an individual or a railroad, by crossing with its street that right of way, without a condemnation of the prior easement, it must pay the damages it subjects the owner to by that occupancy. The occupancy—the right of the public to use the private easement—is continuous. If the municipality simply grades or regrades its streets and does this skillfully without trenching on the property of the adjoining owner, it is under no obligation to pay consequential damages because the individual holds his abutting and untaken property subject to the superior right of the governmental agencies to make such changes in the grade of the highways as the public convenience may require.

It is obvious, therefore, that totally different legal principles are applicable to these dissimilar classes of cases.

It was claimed, and some of the prayers were framed upon the theory, that inasmuch as Chatsworth run in another portion of the city had for half a century been a city sewer which the mayor and city council were bound to keep in repair (*Kranz v. Mayor etc.*, 64 Md. 491), and inasmuch as a part of that run, uninclosed, passed under the tracks of the railroad some sixty feet west of Scott street, and because the run had been used as a sewer prior to the location of the railroad, the city, when it built the sewer under Scott street, sixty feet east of the old open run, and then diverted the water from the open run into the new sewer, was not liable for the damages sued for. This proposition assumes that the diversion of the water from the natural sewer into the artificial sewer made the latter the same identical sewer that the former had been, though separated from it by a distance of sixty feet, and that consequently, the damages sued for were sustained, not by the construction of a new sewer across the right of way, but by the repair of an old sewer which existed prior to the acquisition by the company of its right of way. The location of Chatsworth run was not changed by diverting the water from it into a totally different sewer—and that diversion could not convert a recently constructed sewer into one having an existence prior to the inception of the company's prescriptive right.

⁴⁵⁸ The prayers which denied a recovery on the ground that the city could not be held responsible for a change in the grade of its streets were properly refused, because the damages sued for are not damages caused by a change in the grade of a street, but caused by a change in the grade of the railroad and rendered necessary by the method in which the city constructed its street over and upon the company's right of way.

If the company had had no easement—no property right in the lot in question—but possessed a mere license to lay its tracks across or along a public street, then the tenth prayer would have been right. Occupying a street already opened and graded, its occupancy would have been subject to the paramount right of the city to alter and change the grade, and the company would have been bound to know that its use of the bed of the street for railway purposes would be liable at any time to be interfered with whenever the city authorities deemed it necessary for the public welfare: *Kirby v. Citizens' Ry. Co.*, 48 Md. 168, 30 Am. Rep. 455. The effort to distinguish this case from *Northern Cent. Ry. Co. v. Mayor etc.*, 46 Md. 445, because in this the crossing is at grade whilst in that it was above grade is fully

met by Chicago etc. Ry. v. Milwaukee, 97 Wis. 418, and Central Ry. Co. v. Bayonne, 51 N. J. L. 428.

The instruction given to the jury by the learned and able judge of the superior court fully covered the whole law of the case, and as we find that he committed no error in the rulings complained of, the judgment will be affirmed.

Judgment affirmed with costs in this court and in the court below.

MUNICIPAL CORPORATIONS—POWER TO TAKE RAILROAD RIGHT OF WAY FOR STREETS.—A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take part of the right of way of a railroad company by the construction of a public street thereon opened longitudinally: *Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558, 32 Am. St. Rep. 277. A municipal corporation may lay out streets across the tracks of a railroad company: *Extended note to Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 144.

RAILROADS—CONSTRUCTION OF STREETS AND RAILWAYS ACROSS TRACKS OF—COMPENSATION.—As to what compensation a railroad company is entitled, whose tracks have been crossed by another railroad or by a street, see the *extended note to Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 144-147.

MARYLAND STEEL COMPANY v. MARNEY.

[88 MARYLAND, 482.]

NEGLIGENCE—CONTRIBUTORY.—One who voluntarily incurs peril caused by the negligence of another in order to save the life of one imperiled by the same negligence is not debarred from recovery for injury thus received, upon the ground of his own contributory negligence.

NEGLIGENCE.—THE PROXIMATE CAUSE of injury to one who voluntarily interposes to save the life of a person imperiled by another's negligence is the negligence which caused the peril.

NEGLIGENCE.—PROXIMATE CAUSE does not necessarily mean the direct cause in point of time, but may mean the nearest by relation; and remote cause does not mean remote in point of time, but merely in its connection with the primary cause.

NEGLIGENCE.—PROXIMATE CAUSE.—The predominating cause in the production of an injury must be regarded as the proximate cause, although there may be subordinate and dependent causes co-operating to the same end.

NEGLIGENCE—CONTRIBUTORY.—The fact that the injured person did some act by which he incurred or increased danger, does not necessarily involve negligence which prevents recovery, when the danger was created by some wrongful act of the master or of a third person.

NEGLIGENCE—CONTRIBUTORY.—When one risks his life, or places himself in a position of great danger in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, such exposure, or risk, for such person is not negligence.

J. A. and A. & R. L. Preston, for the appellant.

W. R. Marbury, C. W. Kohlmann, and C. B. Slingluff, for the appellee.

487 PEARCE, J. This is an action to recover damages for injuries alleged to have been sustained by the plaintiff, John Marney, through the negligence of the defendant, the Maryland Steel Company of Sparrows Point. The appellant is a body corporate, engaged in the manufacture of iron and steel, and it owns and operates a large establishment and plant for that purpose located at Sparrows Point, in Baltimore county. On the 16th of September, 1895, the plaintiff was in the service of the defendant company, being employed in the foundry where iron castings **488** were made, his special duties being to charge the furnace or cupola with metal and to see that a proper supply of molten metal was ready for the molder whenever required. The molten metal is drawn from the cupola through an orifice, called a tap hole, near the base of the cupola and about five feet from the ground. This orifice is from three-quarters of an inch to an inch in diameter and is closed with clay, which forms an effective plug or stopper to retain the liquid metal. When a flow of metal is required the tap hole is opened by means of a tap bar, which is a clean, sharp iron rod or bar, which is driven through the clay stopper into the tap hole, thus opening the orifice and permitting the liquid metal to flow. When it is desired to stop the flow of metal, it is done by means of an implement called the bot stick. This is a round iron rod or bar with a wooden handle, the whole being about three and a half feet in length, with a flat disc on the end from an inch and a quarter to an inch and a half in diameter. A piece of damp clay is placed on this disc, and is molded by hand into the shape of a cone, completely covering the face of the disc. This stick, with the conical clay stopper upon the end, is driven through the stream of metal into the tap hole, and by a quick turn of the hand and arm the bot stick is withdrawn, leaving the clay stopper in the tap hole, thus closing the orifice until it is tapped for another flow of metal. It is needless to say that the safety of a tapper and of his fellow-servants, whose duties bring them within range of the stream of liquid metal which he controls, requires that he should possess courage, coolness, and skill in his business. The undisputed testimony was that the plaintiff had been a cupola tender for many years and was an expert in charging and tapping them; that he had been accustomed to the use of the bot stick since 1868, and was considered very skillful in that

particular business; the foreman of the foundry department testifying that the foreman of the shops, who employed all the men in the foundry, brought Marney there "as an experienced cupola man, being such an extraordinary good hand at that work." But ⁴⁵⁰ his duties in charging the cupola precluded his also performing the regular duties of tapper, and a regular tapper was employed by the defendant company, who was presumably a competent and skillful man, but who was absent on the day of the accident attending a funeral, and his place was supplied by a man who was known by the defendant to be both unskillful and incompetent. The accident occurred in the following manner: The cupola was charged from a platform supported by a scaffold twenty feet above the ground and reached by a stairway. The plaintiff came down the stairs to ask how much metal was required for the next draft, and being informed, stopped and looked at the man who was then tapping at the east tap hole of the cupola, there being another tap hole in the south side of the cupola. He says: "I seen there was a little something the matter with him, and I jumped up [on the elevation made for the purpose] and stopped her in—and then I went up stairs." Sometime after this a workman, one George Struckler, since dead, called out, "John, O Marney, this is leaking over here," and a moment later, Doyle, who was foreman of the laborers—and in a position of authority over all of them—called, "Jack, she is getting away on this [the south] side"; whereupon plaintiff sprang down the stairs, seized a bot stick and a piece of clay, put it on the bot stick, and, just as he was about to apply it to the tap hole, the metal, which was oozing out, burst over the stopper then in the tap hole, flew up and struck him on the body, and in the face and eyes, causing intense agony for several months and absolutely and permanently destroying the sight of both eyes. Plaintiff testified that he was in no danger himself when called; that he could in two steps have gotten behind the furnace, which would have saved him, but that there was a common gangway in front of the tap hole and a number of men were working in front of it; that he knew the danger to all these men if the iron, which was then oozing out, should burst through the defective stopper and fall upon the hard floor, and that he went there to save the life of the men ⁴⁹⁰ around there. This testimony was not disputed, nor was the incompetency of the temporary tapper denied, though it was claimed that this incompetency was as well known to the plaintiff as to the defendant, and it was contended that the plaintiff's injury was caused by the

negligent and reckless manner in which he attempted to stop the leaking tap hole, and that but for this negligence on his part no accident would have occurred. This defense was properly submitted to the jury by the defendant's fifth and seventh prayers, which were granted, but the jury rendered a verdict for the plaintiff for fifteen thousand dollars, and from the judgment thereon this appeal was taken. It was also contended at the trial below that as the plaintiff, by his own admission, voluntarily left a position of safety and exposed himself to peril, that he was thus guilty of contributory negligence which must defeat his recovery.

Three exceptions were taken by the defendant in the course of the trial. During the examination of the plaintiff as a witness his counsel asked him the following question: "State whether or not there is any danger of injury to people standing or working in the neighborhood of a tap hole to be feared from the molten metal being allowed to escape or to continue to escape the way you say it was when you went there to stop it?" Defendant objected to this question, but the court overruled the objection and permitted the question to be asked, and the witness answered: "There was such danger from the simple fact that as soon as molten iron runs down any stick or hard surface, or anything that is damp, it won't stay there and it's going to fly; it would have went twenty feet and burnt the people around there, and there was not a man, if it had occurred, that would have escaped out of that corner without being burned, because it would come like a shower of hail right on top of them. It would strike the hard surface and then fly all over the shop. Every man in the radius of twenty feet would get it, because it don't give any notice when it is coming. It comes in a hurry. I have seen too much of it."

491 To the action of the court in overruling the objection to this question and in permitting the answer to be received in evidence, the defendant objected, and this constitutes its first exception. The second and third exceptions were taken to the rulings on the prayers, which will be set out in the reporter's statement of the case. The defendant's first and second prayers were offered at the close of plaintiff's testimony, and their rejection at that stage of the case constitutes its second exception. These prayers were renewed, with five other prayers, at the close of all the testimony, and the plaintiff also offered two prayers. The court granted the plaintiff's prayers and also granted the defendant's fifth and seventh prayers, and rejected its first, second, third, fourth, and sixth prayers, and overruled a special ex-

ception taken by the defendant to the plaintiff's first prayer, on the ground that there was no evidence to sustain it, and the defendant's third exception was taken to the granting of plaintiff's prayers, to the rejection of its own first, second, fourth, and sixth prayers, and to the overruling of its special exception to plaintiff's first prayer.

The general principles of law upon the application of which this case must depend are well established, but there is involved one question which has never been passed upon by this court, namely, whether one who voluntarily incurs peril caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is debarred from recovery upon the ground of his own contributory negligence. This question is an interesting one and has received intelligent and thoughtful consideration in the decisions of other tribunals, by the aid of which we think it will not be difficult to reach a correct conclusion upon the facts of this case. The evidence shows that the temporary tapper, Felix, and the plaintiff, Marney, were fellow-servants of the same master, the Maryland Steel Company; that Thomas G. Doyle was foreman of the laborers and riggers in the foundry department; that John P. Hines was foreman of the shop, employed all the men in the ⁴⁹² shop, and had charge of everybody around the foundry, and that Mr. Sahlin was the superintendent of the Maryland Steel Company and "was boss over all the bosses and men in the works." In all cases where the relation of master and servant is created by a mere agreement that the servant is to labor for the master at a certain rate of compensation, there arise by implication certain reciprocal rights and obligations on the part of each, which the law recognizes as fully as if expressed in the agreement. Bailey, in his work on the master's liability for injuries to the servant, states the chief of these implied obligations as follows: 1. That he will provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to his employment will permit; 2. That he will provide a suitable and reasonably safe place for the doing of the work to be performed by the servant; and 3. That he will provide, when required by the nature of the work, other servants reasonably skillful and competent for the performance of their particular work, so that the servant may not be exposed to unnecessary risk or peril from unskillful or incompetent fellow-servants. In the performance of these and all other similar duties the master is not a guarantor against the negligence of his servants, and is bound only to the exercise of reasonable and ordinary care. Every servant entering

into the employment of a master takes upon himself the risk of injury from the negligence of his fellow-servants, and for such negligence the master cannot be held liable, unless he himself has been guilty of negligence in the selection of the servant whose carelessness caused the accident, or unless, knowing his incompetency, or having sufficient opportunity to know it and failing to discover it, he has retained the negligent employé in his service: *Mayor v. War*, 77 Md. 597.

And in this case, as in the case just cited, the declaration is framed upon a distinct recognition of these undisputed principles. In order, therefore, to recover for the terrible injuries which the plaintiff has received in the service of the defendant, it is necessary for him to ⁴⁰³ establish by legally sufficient evidence: 1. That the accident was the direct result of the negligence or incompetency of the tapper, Felix; 2. That the defendant, prior to the employment of Felix as tapper on that special occasion, had knowledge of his incompetency, or that after his employment and before the accident the defendant discovered his incompetency but nevertheless retained the incompetent servant; and 3. It must not appear from the evidence that he has himself been guilty of any negligence directly contributing to produce his injuries.

The evidence of the gross incompetency of Felix as a tapper, as well as the full knowledge by the defendant of such incompetency, before his employment on the day of the accident, and of its demonstration anew to the defendant on that day and before the accident, is undisputed and overwhelming. Johnson, one of the molders employed by defendant, testified that he had known Felix over a year; "that he appeared to be of a very nervous disposition at that character of work, and, judging from my knowledge of the foundry, I should not judge him to be a man competent for the position; he wasn't acquainted with the principles I have seen experienced men adopt for that character of work"; and again he says, "if he is timid of the hot iron, he is fearful of doing his duty; he wants to get away from it as soon as he can, and if he is an incompetent man he will leave it whether it is secured or not, because he is not aware of the fact."

Hines, another molder by trade who had been with the Maryland Steel Company five or six years and who was foreman of the shop at the time of the accident, testified that Felix had been previously employed there as a tapper, but had got burnt a couple of times, "that he was afraid to tap—afraid he would burn himself and the other men; he would run away and let it

go if it got the best of him—that the men around the cupola said he could not do the work right, so I took him away and put another man in his place—he was not competent, but I had to put him there this day because the regular ⁴⁹⁴ cupola man was off at a funeral.” He also testified that Mr. Sahlin, the general superintendent, saw Felix tapping nearly every day when first employed and saw him running away when the iron bounced over the top of the runner, and that Sahlin told him to put another man in his place, and he did so; that on the day of and before the accident Sahlin was standing in front of the cupola while Felix was tapping, and said, “this man will burn himself and the other men,” but did not say anything about turning him off. He also testified that Sahlin knew he, Hines, knew nothing of tapping, but that Sahlin insisted upon his taking the position of foreman, and charged him with the duty of employing the men for all the work, though he objected to doing so, and only took it temporarily till they could get some one else. It does not appear that Marney knew before the accident of the incompetency of Felix, but he testified that he observed him tapping on that day and “seeing there was a little something the matter with him,” he stopped the tap hole for him at that time. He also testified that the stopper, which was leaking when he was injured, was a very light and insecure one, and that it is the duty of a man when he leaves it for any considerable length of time (as it was shown Felix did on that occasion) to secure it, and that it was criminal to leave a stopper that way, because that was a gangway with men working all round there.

These extracts from the testimony establish beyond all question the gross incompetency of Felix for his work, and the full and continuous knowledge of this incompetency by the defendant, thus charging it with flagrant negligence in his selection for such work. But it still remains to be shown that the accident was the direct result of the incompetency of Felix, and of this we have no doubt, though it was strenuously contended by the appellant’s counsel that the cause of the accident was not the negligence of defendant in supplying an incompetent fellow-workman nor the negligence of Felix in not properly securing the tap hole, but that it was the action of Marney himself in attempting to prevent ⁴⁹⁵ the consequences of the negligence of Felix by stopping the tap hole himself; and this requires some consideration of the doctrine of proximate and remote cause. In discussing this subject, Mr. Bailey, in his work already referred to, says on page 418: “It is perhaps well to call attention to the fact that proximate cause does not mean the direct cause in point of time,

but may mean the nearest by relation; that remote cause does not mean remote in point of time, but merely in its connection with the primary cause. To illustrate: a farmer along the line of a railroad may open the fence maintained by the company for temporary purposes, and while so left open his cattle may stray upon the company's track and receive injury by coming in contact with the company's trains, without any fault being chargeable to its servants in charge. The direct cause of such injury would be the collision. The remote cause in point of time would be the act of the farmer in leaving the fence open. The remote cause in point of time becomes the proximate cause in producing the injury. We go back of the direct cause to find a negligent act which made the collision and injury probable, without which the accident and injury would not have occurred, and we charge such an act with the responsibility for the injury." This method of reasoning is in harmony with that of this court in Baltimore etc. R. R. Co. v. Reaney, 42 Md. 136, where Judge Alvey says: "In the application of the maxim, *In jure non remota causa sed proxima spectatur*, there is always more or less difficulty and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. Courts do not indulge in refinements and subtleties as to causation that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned. It is certainly true, that where two or more independent causes concur in producing an effect, and it cannot be determined ⁴⁹⁶ which was the efficient and controlling cause, or whether without the concurrence of both the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his own wrong; and that as a loss has actually happened, whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done. The principle is well

settled that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrongdoer."

The case of *Gibney v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, is a recent practical application of the principles stated in *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 136. Plaintiff, with her husband and infant son, were crossing a bridge over the Erie Canal; the child fell through an opening in the railing of the bridge, which was left unguarded, into the canal; the father plunged into the canal to rescue the child, and both were drowned. It was held "that while the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the cause of the peril in both cases might be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition." The principle of these decisions seems to us to be quite decisive of the view that the negligence of Felix was the proximate and efficient cause of the accident which produced the plaintiff's injuries. Adopting the reasoning and language of Mr. Bailey, ⁴⁹⁷ cited above, we go back of the direct cause (in this case the interposition of Marney to save life) to find a negligent act (in this case the deliberate employment by the defendant of a servant known to be grossly incompetent) which made an accident probable, without which the accident and injury would not have occurred, and we charge that act with the responsibility for the injury.

But it is further contended that even if the proximate cause is thus correctly ascertained, the plaintiff has been guilty of such concurring negligence as must defeat his recovery, and this is claimed upon two distinct grounds: 1. That his leaving his position of safety, even to save life, was in itself fatal to his recovery; and 2. That if this be not correct, the use of a wet bot stick and wet clay by an experienced tapper constituted gross negligence on his part. There can be no doubt that actual negligence by the plaintiff in the manner of his interposition should defeat his recovery, and this defense was therefore properly submitted to the jury on the testimony of Doyle and Dr. Woodward, by the defendant's fifth and seventh prayers which were granted, but the jury found by their verdict that plaintiff was free from actual negligence. It only remains, therefore, to consider whether plaintiff's interposition, without actual negligence, in order to save life, constitutes negligence per se, and we are of opinion

that it does not. This is the doctrine of the text-writers. Pierce, in his work on Railroads, page 328, says: "The fact that the injured person did some act by which he incurred or increased danger does not necessarily involve negligence which will prevent recovery, where the danger was created by some wrongful act of the company. The question is for the jury whether he acted from wrongheadedness, or as a prudent man would have done under the circumstances." Beach, in his work on Contributory Negligence, section 42, speaking of the conduct of persons who are themselves exposed to sudden danger, says: "When one risks his life, or places himself in a position of great danger in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in ⁴⁹⁸ danger of great bodily harm, such exposure and risk for such purpose is not negligence." It was so held in *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721, where Eckert, in the effort to save a child from being negligently run over by one of defendant's trains, lost his life without actual negligence on his part; and Judge Grover said: "It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If from the appearances he believed that he could, it was not negligence to make an effort to do so, although believing he might possibly fail and receive an injury himself. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." It was so held in Ohio, in *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, where the reporter, paraphrasing the opinion of the court, in the head note, states it thus: "In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributable to the party that negligently or wrongfully exposed to danger the person who required assistance." Eckert's case was recently approved in a strong and clear opinion in *Gibney v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, and it has been followed by the courts of last resort in a number of the states. In *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692, where the court said: "The law does not require cowardice or inaction in such a state of things, and it does not follow as a matter of law that, in encountering the danger, he was necessarily guilty of a want of due and reasonable care." So in *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173, where an engineer refused to leave his post, and went to his death in the dis-

charge of a duty cast upon him. So, also, in *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 563, 53 Am. Rep. 594; in *Condiff v. Kansas City etc. R. R. Co.*, 45 Kan. 260; in *Cottrill v. Chicago etc. Ry. Co.*, 47 Wis. 634, 32 Am. Rep. 796, and in *Peyton v. Texas etc. Ry. Co.*, 41 La. Ann. 862, 17 Am. St. Rep. 430. These views are in accord with our own. The plaintiff in this case, though moving in an humble sphere, has given an example of genuine and heroic manhood, and has demonstrated that in his ⁴⁹⁹ estimation "the duties of life are more than life." The plaintiff's first prayer requires the jury to find that the defendant knowingly employed and retained an incompetent servant; that this servant, by reason of his incompetency, brought about the sudden and imminent danger of the explosion which actually occurred; that the plaintiff interposed to avert this danger, and in so doing employed the usual and ordinary methods for that purpose and exercised such care as a reasonably prudent man could be expected to exercise under such circumstances; and there was abundant evidence to sustain the theory of the prayer. In framing it the defendant was not a "forgotten man," nor in granting it did the court permit the plaintiff to be generous at the expense of the defendant, for the prayer required the jury to find a default on the part of the defendant which originated the danger, and continued in operation until the moment of the accident. It follows from what we have said that there was no error in granting this prayer, nor in overruling the special exception thereto, which was in any event defective in failing to specify in what respect the evidence was alleged to be insufficient to support the prayer.

The plaintiff's second prayer correctly stated the rule of damages applicable to the case. Without the evidence objected to in the first exception, the plaintiff could not have laid the foundation for his defense, and there was no error in its admission.

The defendant's first, second, third, and fourth prayers are all based upon the erroneous view that the interposition of the plaintiff under the circumstances was negligence per se, and they were therefore properly rejected. The fourth prayer was open to the further objection that it ignored the evidence that plaintiff was to stop the cupola when called, and that he was called by Struckler, and also by Doyle, who was his superior in authority and had the right to direct him.

The defendant's sixth prayer might be disposed of on the same ground as the others, since, even if plaintiff had known of Felix's incompetency, this would not make his ⁵⁰⁰ interposi-

tion to save life negligence per se; but, apart from this consideration, it would have been erroneous to say that the undisputed evidence showed that plaintiff had this knowledge when there was in fact no positive testimony on this point.

Finding no error in any of the rulings, the judgment will be affirmed.

Judgment affirmed with costs above and below.

NEGLIGENCE—CONTRIBUTORY—ATTEMPT TO SAVE LIFE.—One who attempts to rescue a person placed in a position of immediate and deadly peril through the negligence of a railway company and who is himself injured in such attempt, may recover of such corporation for the injury so suffered, if, when considered in connection with the emergency under which he was called to act, and the confusion attending it, the jury is of the opinion that his conduct was not negligent: *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553. It is well settled that the law has so high a regard for human life that it will not impute negligence to an effort to preserve life, unless made under circumstances which, in the judgment of prudent persons, constitute rashness: Extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 849.

NEGLIGENCE.—THE PROXIMATE CAUSE of an event is that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition: *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429; *Connell v. Chesapeake etc. Ry. Co.*, 93 Va. 44, 57 Am. St. Rep. 786; monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 808.

NEGLIGENCE—PROXIMATE CAUSE—RISKING LIFE TO SAVE PROPERTY.—When the risking of one's life to save property is not the proximate cause of an injury caused thereby: *Berg v. Great Northern Ry. Co.*, 70 Minn. 272, 68 Am. St. Rep. 524.

STATE v. FOWLER.

[88 MARYLAND, 601.]

SHERIFFS—WRONGFUL ACTS—LIABILITY OF SURETIES.—The sureties of a sheriff are liable for his wrongful acts done *virtute officii*, but not for those done *colore officii*. Acts done *virtute officii* are such that, if properly done, they create no liability, but which, if neglected, or improperly done, or which involve an abuse of discretion, render the officer and his sureties liable. Acts *colore officii* are such as neither the office nor the writ gives the officer authority to do, and for the latter his sureties are not liable.

SHERIFFS—LIABILITY OF SURETIES FOR LEVY OF EXECUTION.—The illegal and oppressive levy of an execution upon property subject thereto by a sheriff, is an official act for which his sureties are liable.

SHERIFFS—WRONGFUL LEVY OF EXECUTION—LIABILITY OF SURETIES.—The levy of an execution by a sheriff upon a growing crop of fruit, which he forbids the owner to pick, and which he neglects to pick himself, thus causing its loss, is a wrongful act for which his sureties are liable in damages.

EXECUTIONS—PROPERTY SUBJECT TO.—A crop of peaches or other fruit requiring periodical expense, industry, and attention, in its yield, is *fructus industriales* and subject to execution as personal property.

EXECUTIONS—LEVY UPON GROWING CROP.—In levying an execution upon a growing crop, a manual taking of possession is not necessary, and a proper notification and indorsement on the levy is sufficient.

J. M. Munroe and J. P. Poe, for the appellant.

D. R. Magruder and R. Moss, for the appellee.

602 **PEARCE, J.** This is a suit upon the official bond of Joseph O. Fowler as sheriff of Anne Arundel county. The declaration alleges that Thomas H. Arnold, on the 14th of May, 1897, obtained judgment in the circuit court of Anne Arundel county against Samuel T. Wilson, the equitable plaintiff in this case, for the sum of one hundred and forty-eight dollars and twenty-nine cents and eight dollars and fifteen cents costs of suit; that on August 31, 1897, a writ of *feri facias* upon this judgment was issued out of the same court, to the said sheriff, in virtue of which, on the 1st of September, 1897, he seized and took in execution the growing crops of corn of said Wilson upon forty acres of land, and the growing peach crop of said Wilson on about six hundred peach trees, said corn and peaches being of much greater value than was necessary to satisfy said judgment and costs; that the sheriff forbade the plaintiff to pick, ship, or sell the said crop of peaches, or any part thereof, and failed and neglected himself to pick, ship, or sell, or to provide for picking, selling, or shipping the same, though said crop of peaches was then ready to pick and ship, and was perishable in its nature; that the sheriff so held said peach crop from the 1st to the 4th of September, when he released the levy thereon, as not necessary to protect the judgment, during which time he suffered the fruit to fall from the trees and rot upon the ground, so that the crop of peaches became utterly worthless and was wholly lost; and that the conduct of the sheriff in the execution of the writ of *feri facias* was wrongful, illegal, and oppressive, and the plaintiff was thereby greatly damaged, and an action had accrued to him upon said official bond.

The sheriff and his sureties pleaded that the sheriff 603 did well and faithfully execute the said office of sheriff, and did not wrongfully, illegally, and oppressively execute the writ of *feri facias*, and issue was joined upon this plea. Without going into the details of the testimony, it is sufficient to say that it fully

sustained every averment of fact in the declaration. At the close of the testimony, the defendants offered a prayer that there was no evidence legally sufficient to enable the plaintiff to recover under the pleadings and evidence in the case, and the verdict of the jury must be for the defendants; and the court granted the prayer, to which ruling of the court the plaintiff excepted and has brought up this appeal. The gravamen of this declaration is the wrongful, illegal, and oppressive manner in which the sheriff executed the mandate of the writ of fieri facias, and a question of law as to the liability of the sureties in this action is thus presented, which is one of first impression in this court. In view of the complete correspondence in this case of the allegata and probata, it would seem that this question would have been better raised by a demurrer to the declaration than to the evidence, but the defendants preferred, for reasons doubtless satisfactory to them, to rest upon the denial as presented by their plea.

We were advised by the argument of counsel that the defense was based, and the court below rested its decision upon, the opinion of this court in *State v. Brown*, 54 Md. 322, and it becomes necessary, therefore, to give to that decision, and to the principles and authorities upon which it is founded, careful consideration. That case was a suit upon a bond of a constable to recover damages for the taking of plaintiff's property under an execution against a third party. There was a demurrer to the declaration which was sustained, and this court affirmed the judgment on the demurrer, holding that the taking of a stranger's property under an execution was not a wrong done in the discharge of the constable's official duty, and was not within the terms of the contract entered into by the sureties. Whatever deductions may be drawn from that decision, or from the ⁶⁰⁴ language used in the opinion, there is a marked distinction between that case and the present one. There, Chief Judge Bartol said: "The only question presented by the appeal is whether an action can be maintained against a constable and his sureties on his official bond for a trespass committed by him in taking the goods of the equitable plaintiff on an execution issued against the property of another person"; whereas, here, the only question is whether an action can be maintained against a sheriff and his sureties on his official bond for wrongful and oppressive conduct in executing his writ, according to the mandate thereof, upon the property of the same person against whom the execution issued, and in the taking of which no trespass can be

committed. The code prescribes the same condition for the bond of sheriffs and constables, viz., "that he shall well and faithfully execute the office of ——— in ——— county, in all things appertaining thereto," and there is no other statute explaining or affecting the liability of their sureties. The decision in *State v. Brown*, 54 Md. 322, turned upon the distinction between acts done *virtute officii*, and those done *colore officii*—the act complained of in that case being held to belong to the latter class. Upon the soundness of that distinction as there applied, courts of high reputation and judges of great distinction have differed, and still differ, widely. In *Lammon v. Feusier*, 111 U. S. 17, where a conclusion was reached different from that of 54 Maryland, many of the cases are cited and reviewed. When such eminent judges as Chief Judge Green of New Jersey, Judge Cowen of New York, and Judge Ruffin of North Carolina, are found in accord with the view expressed in 54 Maryland, and Chief Judges Shaw of Massachusetts, Tilghman of Pennsylvania, Bronson of New York, and Thurman of Ohio, with Judge Miller of the supreme court, are found opposed to that view, it is apparent that the question is one of much difficulty. We think, however, that the view expressed by Judge Bartol must be admitted to be in accord with the principles announced in the earlier cases in this state where trespasses by sheriffs have been considered, and to be ⁶⁰⁵ supported by some strong practical considerations of public policy, and we have, therefore, no disposition to question or weaken its legitimate authority in similar cases. So far as the liability of sureties rests in contract, as expressed in the condition of the obligation, we have, in the recent case of *State v. Hill etc. Co.*, 88 Md. 111, emphasized our continued concurrence in the doctrine that such liability is not to be extended beyond the terms of the obligation. But we do not think the case in *State v. Brown*, 54 Md. 322, can, by any fair process of reasoning, be made to control the case before us. In that case the court quotes with approval from *Alcock v. Andrews*, 2 Esp. 542, note, the distinction drawn by Lord Kenyon "between wrongful acts by an officer done *virtute officii* and such as are done *colore officii*." Lord Kenyon says: "The former are where a man, doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him. The latter are where the act complained of is of such a nature that the office gives him no authority to do it. In the doing of that act he is not considered an officer." Within the limits of this extract, thus approved by this court, we think, abundant war-

rant can be found to maintain this action, and this conclusion, we think, is fortified by authority. If this be not so, then, as was argued in this case, the sheriff is well nigh an irresponsible autocrat, liable, indeed, officially for his failure to perform some positive duty enjoined for the benefit of the plaintiff in execution, but liable to no one else officially for any wrong he may perpetrate thereunder *virtute officii*. Treating of the duties of a sheriff in executing a writ, Judge Cooley uses the following language: "A sheriff's officer must so execute writs intrusted to him as to do as little damage as possible to respondent debtors, and where it is important to the debtor's business to have the benefit of his exemptions, the officer is bound to act promptly in setting them off to him. In levying, an officer has no right to seize and hold the whole of a debtor's property to satisfy a debt, which, even if all exemptions were allowed, would be more than secured ⁴⁰⁶ by the remainder; and if he thereby precludes the debtor from engaging in his customary business, his action is oppressive and unjustifiable. The officer is, or should be, a minister of justice, and not of oppression": *Handy v. Clippert*, 50 Mich. 355.

The application of the above passage to the case at bar is not less apparent than is the sound common sense of the doctrine which it asserts.

In *Knowlton v. Bartlett*, 1 Pick. 274, the action was against the sheriff for the malfeasance of his deputy, and the court said: "An official act does not mean what the deputy might lawfully do; if so, no action would ever lie against the sheriff for the misconduct of his deputy." That is to say, if only lawful acts are official acts, then the sheriff is never responsible for the acts of his deputy, since by a lawful act of the deputy no one can be injured in legal contemplation, while for an unlawful act—since not an official act—the person who is thereby in fact injured is not permitted to sue the sheriff. It may be that the same rule cannot safely be applied between the sureties and the sheriff as between the sheriff and his deputy—he and his deputies being regarded in law as one person—but this cannot impair the force of the language employed by the court to define an official act. We find nothing in *State v. Brown*, 54 Md. 322, inconsistent with this expression of the court in 1 Pickering. On the contrary, we think the language of the opinion, by fair and logical deduction, entirely consistent therewith. Judge Bartol says: "If he commits an act, not in the discharge of his official duty, he is personally liable, but his sureties cannot be held re-

sponsible therefor; it is not within the terms of their contract." Surely it is a just inference from the above that if he commits a wrongful act in the discharge of his official duty, his sureties are responsible, and it is within the terms of their contract. Again, Judge Bartol refers to the dissenting opinion in *People v. Schuyler*, 4 N. Y. 173, as more satisfactory in its reasoning than the majority opinion in that case by which *Ex parte Reed*, 4 Hill, 572, was overruled. He also refers approvingly to the reasoning of the able ⁶⁰⁷ opinions rendered in *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54, which are in accord with *State v. Brown*, 54 Md. 322. Let us see, then, how these opinions thus commended will affect our consideration of the case at bar. In both these cases the question before the court was precisely the same as in *State v. Brown*, 54 Md. 322. In *People v. Schuyler*, 4 N. Y. 173, Judge Pratt, who delivered the dissenting opinion, concurred in by two other judges, using this language: "The question, therefore, in this case is not whether the sheriff has not done some act *colore officii* for which he may be liable to an action; but the question for our consideration is whether the declaration shows any misconduct in his office, any want of fidelity to the trust reposed in him as sheriff, or any failure in his official duty as such by which the plaintiff has suffered damage. The authorities recognize a principle or rule by which the acts of the sheriff for which his sureties may be held liable can be distinguished from those acts for which they will not be held liable. The former are termed acts done *virtute officii*, and the latter *colore officii*. The distinction is this: Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them. This distinction is as old as the common law, and has been acted upon and recognized in numerous cases. . . . It is based upon correct legal principles and is supported by abundance of authority. In the one case, the inquiry relates entirely to the official conduct of the officer, whether he has neglected any duty which the law imposed upon him, or whether, in doing any act which the law requires him to do, he has acted faithfully and honestly; whilst in the other case, his care, or diligence, or faithfulness, is not a subject of inquiry at all, the inquiry being limited exclusively to his power or authority to do the act."

So in *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54, Chief

Judge Green said: "The complaint against the sheriff is, not that he did not perform his duty, nor that he performed it improperly, but that he acted beyond his duty; that he ⁶⁰⁸ did an act which neither his writ nor his office authorized him to do, and thereby became liable as a tort feasor. . . . If, on the other hand, the sheriff had been sued by the defendant in the execution of any abuse in the execution of the writ, the conduct of the sheriff in office would be drawn directly in question, and an absence of official malfeasance or misconduct would have constituted a good defense to the action."

Judge Haines, who delivered a concurring opinion in *State v. Conover*, 28 N. J. L. 230, 78 Am. Dec. 54, says: "It is a principle long and well established that official acts are those which are done by virtue of the office, such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done render both liable. If the authority is exceeded, or the duty omitted, an action may be maintained against the officer in his official capacity, and his sureties held responsible. In England no direct authority can be found upon the point, for the reason that the sheriffs there are not required to enter into official bonds with sureties, but are required to be of sufficient freehold ability to meet the claims of all parties injured, and are only liable in suits against themselves, or to amercement for neglect of duty."

So also in *Governor v. Hancock*, 2 Ala. 728, which holds with *State v. Brown*, 54 Md. 322, Judge Goldthwaite said: "We will not say that the sureties of a sheriff are not liable in some cases of malfeasance, but in such we think the malfeasance must include a misfeasance also; as, for instance, if a sheriff should wantonly destroy property levied on by him, this would be a tortious act, but there would likewise be a tortious omission of his duty, which is to keep the property safely." It was upon this view that it was held in *Witkowski v. Hern*, 82 Cal. 604, that, though a constable seized plaintiff's property under a proper writ, yet if he so kept the property while in his custody as that by his carelessness or negligence it was damaged, he and his sureties were responsible for the nonperformance of his official duty.

We think it is clear upon principle, from this review ⁶⁰⁹ of the authorities, that the plaintiff's action in the case at bar is maintainable and that the decision in *State v. Brown*, 54 Md. 322, was not designed to be, and cannot be, invoked to defeat his recovery. The act which the sheriff did was the act of levy-

ing upon the peach crop as a chattel subject to execution. This act his office authorized, and his writ commanded. It was consequently an official act, for which he and his sureties were liable. It was argued in behalf of the appellees that a growing crop of peaches is not the subject of a levy under an execution, and that in levying thereon the sheriff was a trespasser, and the case was thus brought within the principle ruled in *State v. Brown*, 54 Md. 322, but this cannot avail the defendants. It was expressly held in *Purner v. Piercy*, 40 Md. 223, 17 Am. Rep. 591, "that a growing crop of peaches, or other fruit requiring periodical expense, industry, and attention in its yield and production, may be well classed as *fructus industriales* and not subject to the fourth section of the statute of frauds"; and it is settled upon satisfactory authority that *fructus industriales* may be taken in execution and sold. The tree or plants are *fructus naturales*, the fruits are *fructus industriales*: 8 Am. & Eng. Ency. of Law, 2d ed., 313; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Stambaugh v. Yeates*, 2 Rawle, 161; *Craddock v. Riddlesbarger*, 2 Dana, 307.

It was also contended that even if subject to levy, no valid levy was in fact made; but in levying upon growing crops, manual possession, concurrent with the making of the levy is impossible, and it is held that proper notification to the party and indorsement on the levy is all that is necessary: 8 Am. & Eng. Ency. of Law, 310; *Barr v. Cannon*, 69 Iowa, 20.

We think the circuit court was in error in granting the defendant's prayer, and for this error the judgment must be reversed and the cause remanded for a new trial.

Judgment reversed with costs above and below, and cause remanded for a new trial.

SHERIFFS—LIABILITY OF SURETIES FOR ACTS OF.—The sureties on the official bond of a sheriff or constable are liable for his defaults, with respect to acts done or to be done *virtute officii*. There is some conflict on the point as to whether or not they are liable for his acts done *colore officii*: Extended note to *Commonwealth v. Cole*, 46 Am. Dec. 510. That a sheriff and his sureties are liable on official bond of such officer for torts committed by him under color of his official right, see *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148.

SHERIFFS.—ACTS DONE VIRTUTE OFFICII are where they are within the authority of the officer, but in doing them he exercises that authority improperly or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them: Monographic note to *Commonwealth v. Cole*, 46 Am. Dec. 510.

EXECUTION—CROPS SUBJECT TO.—Growing annual crops are personal property, and subject to execution: *Sims v. Jones*, 54 Neb.

769, 69 Am. St. Rep. 749, and note. That peaches growing on the trees are not such goods and chattels as may be taken in execution on a *fi. fa.*, see the note to *Norris v. Watson*, 55 Am. Dec. 163.

EXECUTION—LEVY OF.—That taking possession of property is not indispensable in levying an execution, see *Nighbert v. Hornsby*, 100 Tenn. 82, 66 Am. St. Rep. 736.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

PETERSON v. WESTERN UNION TELEGRAPH COMPANY.

[72 MINNESOTA, 41.]

LIBEL—TRANSMISSION BY TELEGRAPH—PUBLICATION.—If a libelous telegraphic message is delivered to an operator at one place, and by him transmitted by sound over the wires to the operator at another place, and by the latter reduced to writing and delivered to the addressee, this constitutes a publication of the libel.

NEGLIGENCE — EXEMPLARY DAMAGES.—Mere negligence, unless so gross as to amount to positive bad faith, is no ground for awarding exemplary damages.

NEGLIGENCE — EXEMPLARY DAMAGES.—Mere negligence on the part of a telegraph company in allowing its operator to transmit a libelous message is not ground for exemplary damages.

Ferguson & Kneeland, for the appellant.

S. L. Pierce, for the respondent.

⁴² MITCHELL, J. This case was here on a former appeal (Peterson v. Western Union Tel. Co., 65 Minn. 18), ⁴³ the opinion in which may be referred to for a full statement of the facts. It was there held that the forwarding of the alleged libelous message by the defendant over its wires to its operator at St. Paul constituted a publication; that the message was on its face fairly susceptible of a libelous meaning; also that the evidence was sufficient to justify the jury in finding that defendant's operator published or transmitted the message maliciously, and not in good faith. If there is any difference between the evidence on this last point on the first trial and that

adduced on the last trial, the latter is the stronger against the defendant.

The message was delivered in writing to the operator at New Ulm, and by him transmitted over the wires to the operator at St. Paul, to be by him reduced to writing and delivered to the plaintiff, which was done. The fact affirmatively appears on the second trial that the message was transmitted over the wires by sound, and the point is now made that the mode of communication was oral, and not written, and therefore there was no publication of a libel; the distinction between slander and libel being that the former is oral defamation by spoken words, while the latter consists of a publication by writing, printing, pictures, or other durable mode. The alleged materiality of the point lies in the facts that, as defendant claims, the words complained of are not actionable in themselves unless published in writing, and that a corporation cannot be liable for slander.

This point was not raised or considered on the former appeal. We are of the opinion that it is without merit. Whether the means employed by the operator at New Ulm in dictating or communicating the contents of the message to the operator in St. Paul consisted of sounds representing letters, or dots or dashes representing the same thing, can make no difference. In either case, the purpose and result would be the same, viz., the transmission and copying in written form the contents of the written message in the hands of the operator in New Ulm. The result was to put the message in the hands of the St. Paul operator in written, durable form, which he could read and understand as effectually as if the original had been placed in his possession. Words communicated for such an accomplished purpose "have an existence per se off the tongue."

44 When the means of reproducing the contents of a writing are by repeating its contents orally to another, to enable him to put it into writing, and the person to whom it is repeated reduces it to writing, the writing thus produced does not depend for its identification on the oral utterances of the person who reads or repeats, but on the writing itself, which is thus communicated to the person who reduces it to writing; and it can make no difference whether the contents of the writing are communicated by sound over telegraph wires by one operator to another or by a person in audible words to an amanuensis at his side: See *Pullman v. Hill* [1891], 1 Q. B. Div. 524; *McCoombs v. Tuttle*, 5 Blackf. 431; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455. As long ago as *Lamb's case*, 9 Coke, 59a, it was

held that where one, knowing a writing to be a libel, "reads it to others that is an unlawful publication of it"; and in "The Case De Libellis Famosis," 5 Coke, 124b, it was held that a "libel may be published (1) *verbis aut cantilenis*, as where it was maliciously repeated or sung in the presence of others." It is not necessary to go as far as this in order to hold that the facts in the present case constituted the publication of a libel.

2. There was no evidence that the New Ulm operator was not competent and generally faithful in the discharge of his duties, or that he was ever guilty of any breach of duty, unless in the transmission of this message, and there is no evidence that the defendant had any reason, prior to its transmission, to anticipate that he would transmit an improper message. Neither is there any evidence that the defendant ratified or approved of his wrongful act (if it was such) in transmitting this message, unless it is the bare fact that it subsequently retained him in its service.

Upon this state of the evidence, the court, after instructing the jury that if they found that the defendant or its agent was actuated by malice in fact, and that it ought to be punished, further instructed them in that connection as follows: "Perhaps the only fault that can be charged against the defendant in the premises is that it had and retained an operator who would receive and transmit such improper messages, or that it did not have a rule prohibiting the sending of unsigned messages libelous upon their face; and, if the jury should be of that opinion, they ⁴⁵ should make the amount of exemplary damages, if any, reasonably proportionate to the degree of the defendant's fault."

It should be stated in this connection that the defendant had a rule forbidding its operators from sending messages containing profane or obscene language, but none in regard to unsigned or libelous messages. When the court had completed his charge, defendant's counsel took the following exceptions: "I except to that portion of the general charge which submits the question of punitive damages to the jury; and I especially except to that portion of the charge reading substantially as follows [the part above quoted]."

Then ensued the following colloquy between counsel, and between the counsel and the court: "Mr. Pierce: If there is an exception to that part of the charge, I would consent to strike that portion of the charge out. Let's get that—that it might be possibly construed to be a recognition of the fact of fault, I suppose that is the point counsel makes. I just as soon, if they object to do it, to have that clause stricken out. Mr. Fer-

guson: I have referred to that. If that is stricken out, why, then, the case should be dismissed, because there isn't any other fault of the company. Mr. Pierce: I think, perhaps, that clause might be stricken out. Mr. Ferguson: I except to it. If you want to strike it out, I move to dismiss. By the Court: I guess I won't strike it out. Mr. Ferguson: That is the gist of your action; that is why I except to it. Mr. Pierce: Now, I will ask counsel, then, the particular feature of that— What is it that you object to? Object to the question of submitting the question of punitive damages at all, under the evidence of this case? Mr. Ferguson: I except to this, which is the only specific point called out. I don't think that the question of punitive damages should be submitted to the jury. Mr. Pierce: I might say that it might be modified, with the suggestion that, if these facts might be found, it is rather a matter for the jury to determine. By the Court: I don't feel disposed to change that at present."

We are of the opinion that the part of the charge especially excepted to contains material error. It may be that it is erroneous in assuming or implying that the defendant was at fault or negligent in each and all of the matters mentioned. But that is not its chief vice. The fatal error in this part of the charge lies in the fact that, in effect and substance, it amounts to an instruction that the mere ⁴⁶ negligence of the defendant in the respects mentioned would justify the jury in awarding punitive or exemplary damages. The defendant's liability, if any, rests upon the doctrine of respondeat superior. If the act of the servant in transmitting the message was wrongful, the defendant is liable, whether it was negligent or not; and, on the other hand, if his act was lawful, the defendant is not liable, however negligent it may have been. Hence, the question of defendant's negligence in the employment of its operator, or in the failure to adopt proper rules, was really foreign to the issues in the case.

Moreover, mere negligence, unless so gross as to amount to positive bad faith, is no ground for awarding punitive damages. The liability of the defendant for such damages, if the act of the agent was actuated by malice or bad faith, is an entirely different matter. It is urged very strenuously by plaintiff's counsel that defendant is not in position to raise this objection, for the reason that, by what subsequently occurred in court, he put his exception to the charge exclusively upon the ground that the question of exemplary damages should not have been submitted

to the jury at all, and that he did not specifically call the court's attention to the particular vice in this part of the charge. We cannot so construe the colloquy between the court and defendant's counsel.

Counsel took two entirely distinct exceptions: 1. To the submission of the question of exemplary damages to the jury at all; and 2. To the part of the charge which stated the grounds upon which the jury might award such damages; and we cannot see anything in what followed that amounted to a waiver of either of the exceptions or a merger of the second in the first. The second exception was sufficiently explicit. Counsel called the court's attention specifically to the particular part of the charge excepted to, embodying it verbatim in his exception. We do not think he was required, under the circumstances, to go further, and explain to the court the reasons why the charge was erroneous. The error in it was not one of mere verbal inaccuracy or incompleteness of statement. As it appears that this case has been tried three times, it is unfortunate that error should have occurred on the trial, but the error is so manifest and so substantial that we cannot avoid granting ⁴⁷ a new trial. This renders it unnecessary to consider any of the other points discussed by counsel.

Order reversed.

LIBEL—TELEGRAM—PUBLICATION.—The writing of a libelous telegraphic message, and the delivery of it to the telegraph company for transmission, constitute a publication thereof: *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, and note.

NEGLIGENCE.—EXEMPLARY DAMAGES are not recoverable for mere negligence: *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144, 30 Am. St. Rep. 41; *Garrick v. Florida etc. R. R. Co.*, 53 S. C. 448, 69 Am. St. Rep. 874; *Spellman v. Richmond etc. R. R. Co.*, 85 S. C. 475, 28 Am. St. Rep. 858, and monographic note thereto.

CLARY v. O'SHEA.

[72 MINNESOTA, 105.]

EJECTMENT—MISNOMER OF PARTY—JUDGMENT AS EVIDENCE.—If, in an action of ejectment, the plaintiff shows the record title to the property to be in one "John O'Shea," a judgment in plaintiff's favor against "John O. Shea," based on service by publication and determining adverse claims in the land, is not admissible in evidence to show a link in plaintiff's chain of title, as it cannot be presumed that "O'Shea" and "Shea," are one and the same names.

NAMES—IDEM SONANS.—"O'Shea" and "Shea" are not the same names nor *idem sonans*.

AM. ST. REP., VOL. LXV I.—30

TAX SALES—NOTICE OF EXPIRATION OF REDEMPTION.—If a notice of the expiration of time of redemption from a tax sale states that the time in which to redeem will expire on two different dates, it is uncertain, ambiguous, and void.

EVIDENCE—SECONDARY PROOF OF WRITING—WANT OF NOTICE TO PRODUCE.—If one asserts for the first time at the trial that a certain written instrument exists, and is in the possession of the opposite party, the former is not allowed to prove its contents by secondary evidence without having given any notice to produce it, although the opposite party denies that such writing ever existed.

LANDLORD AND TENANT—PAROL PROMISE TO PAY RENT—ESTOPPEL.—A parol promise by one in possession of land to pay rent to one out of possession, who has neither title nor right of possession, is void for want of consideration, and is not an estoppel in favor of a landlord as against a tenant.

C. P. Davis and T. Hessian, for the appellant.

J. Lind and A. A. Stone, for the respondent.

106 CANTY, J. This is an action of ejectment. On the trial the court ordered a verdict for defendant, and, from an order denying a new trial, plaintiff appeals.

1. Plaintiff offered in evidence a patent from the United States to one "John O'Shea," and the judgment and judgment-roll in an action brought by plaintiff to determine adverse claims to the property in question. The court refused to receive the evidence, and this is assigned as error.

The defendants named in the summons in that action are "John O. Shea and also all other persons or parties unknown," et cetera. The only service obtained was by publication, and the names of the defendants appear in the same form in the printed copy of the summons and notice of lis pendens contained in the proof of publication. In the judgment and order for judgment the name is written "John O Shea," which is in the same form except that the period is omitted after the "O." In our opinion, it cannot be presumed that "John O'Shea," named in the patent, is the same person as "John O. Shea," named in the summons and proof of service thereof in that action. "O'Shea" and "Shea" are not the same name. The person on whom the summons was to be served by constructive service was selected from all other persons in the world by the name alone, and that name was "Shea." Thus, it does not appear that the judgment is against the person named in the patent. Therefore, the judgment did not constitute a link in a chain of title to plaintiff. Plaintiff did not connect himself with the patent, and the court did not err in rejecting the evidence.

2. We are also of the opinion that the court did not err in

rejecting the proof offered to show that plaintiff had become the owner of the land by reason of two tax sales (each under a tax judgment) and the notice of expiration of the time to redeem under each sale. ¹⁰⁷ Each notice states two dates on which the time to redeem will expire, and is, in our opinion, so uncertain and ambiguous that it is void. One of these notices is, so far as here material, in the following form: "You are hereby notified that pursuant to the tax judgment entered in the district court in the county of Nicollet, state of Minnesota, on the twenty-first day of March, 1888, the land hereinabove described, assessed in your name, was sold for tax of 1886 on the seventh day of May, 1888, and that the time of redemption from said sale allowed by law will expire on the seventh day of May, 1891, or sixty days after service of this notice."

The notice was served January 3, 1891. It will be observed that sixty days from that date was March 4th. Then the notice stated that the time to redeem would expire on March 4, 1891, or on May 7, 1891. This case cannot be distinguished in principle from *Peterson v. Mast*, 61 Minn. 118. There the date sixty days from the date of the notice fell after the other specified date of expiration of redemption. The notice here in question recited the time when the sale was made.

Appellant contends that everyone is presumed to know the law; that anyone knowing the law will understand that the time to redeem will expire three years from the date of sale; and, therefore, there is in law no ambiguity or uncertainty in the notice. In our opinion, the legislature intended to require a notice in fact, not one which can be upheld only by reason of some legal fiction, one which can be understood only by reference to the statute: See *State v. Halden*, 62 Minn. 246. The other notice of expiration is tainted with the same vice, and is also void.

3. Plaintiff claimed on the trial that in July, 1881, he made a written lease of the premises in question to defendant; that the lease was signed by both parties, and was at the time of the trial in the possession of defendant. Without having served on defendant any notice to produce it, plaintiff offered secondary evidence of its contents. Defendant objected, and denied that any such lease was ever made. The objection was sustained, and this is assigned as error.

Appellant contends that, because defendant denied that the ¹⁰⁸ lease ever existed, no notice to produce it was necessary; that it sufficiently appears that a notice to produce it would be

useless, and therefore it may be dispensed with. If defendant had admitted the loss of the written instrument, that would excuse notice to produce it: Wood's Practice Evidence, 28, sec. 11. But, in our opinion, the case is very different where the defendant denies that the instrument had ever existed. Such a complete and total denial ought not to dispense with anything required of plaintiff. The amount of proof required of the one party cannot be less because the denial of the other party is as absolute and complete as it is possible for it to be. To allow the one party to assert for the first time on the trial that a certain written instrument existed and was in the possession of the opposite party, and, because the latter denied that it ever existed, allow the former to prove the contents of the alleged instrument, without having given any notice to produce it, would open the door for perjury and surprise. In our opinion, the court ruled correctly.

4. There was also some evidence introduced by plaintiff tending to prove that, shortly before the time the alleged written lease was made, there was an oral agreement between the parties by which plaintiff leased the premises to defendant. The evidence shows conclusively that defendant was in possession at the time of this alleged oral leasing, and had been for many years prior thereto. Plaintiff had no title or right to possession. A parol promise by one in possession to pay rent to one out of possession, who had neither title nor right of possession, is void for want of consideration: Fuller v. Sweet, 30 Mich. 237, 18 Am. Rep. 122, and cases cited.

This disposes of the case, and the order appealed from is affirmed.

NAMES—IDEM SONANS.—The principle of *idem sonans* is in general applicable to names similarly pronounced, but does not apply to the entry of the defendant's name on the judgment docket, where the name is differently spelled: *Hell's Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590.

TAX SALES.—IF THE NOTICE OF THE TIME when the right to redeem expires specifies the wrong day, it is void, and no valid deed can issue thereon: *Gage v. Davis*, 129 Ill. 236, 16 Am. St. Rep. 260, and note. In Kansas, however, it was held that a notice to redeem land sold for delinquent taxes which gives the date of sale, from which the expiration of the time for redemption may be computed, is not invalid for uncertainty or indefiniteness in fixing the final day for redemption: *Hicks v. Nelson*, 45 Kan. 47, 23 Am. St. Rep. 709, and note.

EVIDENCE.—SECONDARY EVIDENCE of a written agreement may be received where it is in the possession of the adverse party, who withholds it at the trial after notice to produce the original has been served. The notice to produce the original may be given either

to the adverse party or to his attorney: *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, and note; *Lumbert v. Woodard*, 144 Ind. 335, 55 Am. St. Rep. 175.

LANDLORD AND TENANT—ESTOPPEL.—A lessor having no interest, title, possession, or right of possession, cannot make a valid lease to another in possession, and the doctrine of estoppel is wholly inapplicable to such a lease: *Hall v. Benner*, 1 Penr. & W. 402, 21 Am. Dec. 394. Tenancy is the result of a contract between the landlord and the tenant, by which the latter admits the lessor's title, and he and his privies are estopped, while continuing in possession, to dispute such title; but it is the contract, followed by possession, that creates the estoppel; possession without the contract will not: *Shew v. Call*, 119 N. O. 450, 56 Am. St. Rep. 678.

JORDAHL v. BERRY.

[72 MINNESOTA, 119.]

JUDGMENTS—RES JUDICATA.—A judgment by default in favor of a physician for professional services is not a bar to an action against him for malpractice in the performance of such services.

A. J. Daley, for the appellants.

L. S. Nelson, for the respondent.

¹²⁰ **MITCHELL, J.** This was an action to recover five thousand dollars' damages for malpractice by the defendants in the performance for plaintiff of professional services as physicians and surgeons. After the action was commenced and at issue, each of the defendants brought an action against the plaintiff, in justice's court, to recover the value of his services, alleged in one case to be some twenty-two dollars, and in the other seven dollars. The present plaintiff neither answered nor appeared in those actions, and the present defendants, respectively, recovered judgment for the full amounts claimed. They then set up these judgments, by supplemental answers, as a bar or estoppel to plaintiff's recovery in this action. The plaintiff demurred on the ground that the answers did not state facts constituting a defense. From an order sustaining the demurrers, the defendants appealed.

While the doctrine of estoppel by a former adjudication is as old as the law, few questions have given rise of late years to more discussion ¹²¹ and conflict of opinion than the applicability of the doctrine to a state of facts the same or similar to that presented by this case.

In *Bellinger v. Craigue*, 31 Barb. 534, *Gates v. Preston*, 41 N. Y. 113, and *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455, it was held that a judgment in justice's court in favor of a sur-

geon for professional services was a bar to any action against him for malpractice in the performance of such services. In the first and last of these cases the defendants appeared and answered, but afterward withdrew their answers. In the other the defendant did not answer, but consented in writing to the entry of the judgment. We do not refer to this as distinguishing in principle those cases from the present, but it may have had some influence upon their decision: See *Bascom v. Manning*, 52 N. H. 132. Neither do we lay any stress on the fact that an action for services is brought in justice's court, except so far as it illustrates the inconvenience and practical injustice of what we may call the New York doctrine. In *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570, the court applied the same rule to a state of facts not differing in principle.

A directly opposite conclusion was arrived at upon the same state of facts in *Resseque v. Byers*, 52 Wis. 650, 38 Am. Rep. 775; *Lawson v. Conaway*, 37 W. Va. 159, 38 Am. St. Rep. 17, *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308, and *Sykes v. Bonner*, 1 Cin. Rep. 464, in most of which cases the courts reviewed the New York cases and refused to follow them.

This conflict of opinion among the courts gave rise to an extended and somewhat energetic dispute among text-writers. Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong: *Bigelow on Estoppel*, 5th ed., 174 et seq. Mr. Van Fleet takes the same side of the question: *Van Fleet on Former Adjudication*, sec. 168 et seq. Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York, as being much better supported by legal reason, and the best considerations of convenience and justice: 2 *Black on Judgments*, sec. 769. Mr. Browne, in his note to *Resseque v. Byers*, in 38 Am. Rep. 778, says of the New York doctrine that, while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are ¹²²odious at best, and are founded on a technicality, and probably promote more injustice than they prevent.

On the other side, Mr. Herman urges with great earnestness that the New York doctrine is sound, and that the courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res adjudicata* is founded: *Herman on Estoppel*, sec. 231 et seq. We do not find that Mr. Freeman, in his work on *Judgments*, anywhere discusses this precise question; but in view of the fact that, in support of certain general

propositions laid down in his text, he cites the New York cases without any intimation of disapproval, it may perhaps be inferred that he approves of their doctrine: See Freeman on Judgments, sec. 282.

On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient, and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea.

The foundation principle upon which the doctrine of *res adjudicata* rests is, that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate. Rightly understood, no doctrine of the law is more in accord with justice and public policy. The difficulty which has always confronted the courts is to determine the extent of the application of that doctrine. Where an issue has been actually litigated and determined on its merits, there can be no doubt, upon either reason or authority, that the judgment is, as between the parties and their privies, conclusive in relation to that point in any other suit, though the purpose and subject matter of the two suits be different. The difficulty is to determine what points were in issue and determined by the judgment, or, rather, what issues were necessarily involved in the judgment, although not directly and expressly made and litigated.

The American authorities seem to have generally gone somewhat ¹²³ further in applying the doctrine of *res adjudicata* in that respect than the English courts, whose general tendency is to confine the estoppel of a judgment to matters actually disputed.

Looking at the subject from a practical standpoint, there is certainly great danger of working injustice, unless great caution is used, in holding that a judgment is an estoppel upon a certain point, on the ground that it was necessarily involved in the judgment, although the issue was not expressly tendered and litigated. Frequently, one learned in the law can reason out, to his satisfaction, that a particular point was necessarily involved in a judgment, when such a thing would never occur to the ordi-

nary layman. The present case is an illustration of the fact. Whatever conclusion hard logic would require, every one knows that, as a matter of fact, the question of defendants' malpractice was not determined in their suits for services, and that the judgments were in fact for the value of the services, irrespective of, and disconnected from, any claim for malpractice.

The inconvenience of the New York rule, and its liability to work injustice, is further illustrated by the present case. It furnishes an opportunity to create an estoppel by what may not unfairly be called a snap judgment. It is, perhaps, not uncharitable to surmise that this may have been the very object of defendants in bringing their actions in justice court. But, this aside, if plaintiff had appeared and defended those actions, he would have been put to the alternative of alleging the malpractice as a mere defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could only have recovered one hundred dollars, the limit of the justice's jurisdiction, and could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claims of the defendants for services were less than fifteen dollars, the issue, involving a claim of five thousand dollars, would have been conclusively determined by the judgment of the justice, from which neither party could appeal on facts. We concede that such considerations are not, in themselves, of any force, except as illustrating the inconvenience of such a rule; but where it is open to the ¹²⁴ court, upon principle, to choose between two rules, they are entitled to weight.

After starting out with the conceded proposition that a judgment is conclusive of every fact necessary to uphold it, whether the final determination is the result of litigation, or of a default of one of the parties, the reasoning of those who advocate the New York doctrine may be all summed up as follows: If the services were of value, they could not have been useless; and, if of use, they could not have been harmful; and, if not harmful, there could not have been malpractice in the performance of them; therefore a judgment that the services were of value necessarily involved a determination that they were properly performed; and that such an adjudication is necessarily inconsistent with the existence of a claim by the patient for damages

for malpractice in their performance: See *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455, and *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570.

We cannot avoid feeling that this line of reasoning is more technical and theoretical than practical. And, even if technically sound, the doctrine of many of the adjudicated cases certainly does not conform to it, as is illustrated in numerous suits between vendor and vendee and employer and employé. The decisions are too numerous to require citation, to the effect that in the case of a sale of personal property, with a warranty of its quality, a judgment in favor of the vendor for the purchase money (the breach of warranty not having been interposed by way of defense or counter claim) is no bar to an action by the vendor for damages for breach of the warranty. We fail to see why the reasoning adopted in favor of the New York doctrine is not equally applicable to such a case; for, if the property was not as warranted, the contract was broken, and the vendor was never entitled to the full purchase price. It is no sufficient answer to say that the warranty was itself a contract collateral to the contract of sale. There is but one contract, and the warranty is one of its terms, and not a separate and independent contract: *Thompson v. Libby*, 34 Minn. 374.

There are also numerous cases holding that a recovery by an employé on a complaint for services rendered will not estop the defendant employer from recovering damages sustained by him through ¹²⁵ the negligent or unskillful performance of such services; such negligent acts not having been set up or litigated in the action for the services. The following are a few of the many cases which might be cited to that effect: *Mondel v. Steel*, 8 Mees. & W. 858; *Rigge v. Burbidge*, 15 Mees. & W. 598; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Davenport v. Hubbard*, 46 Vt. 200, 14 Am. Rep. 620; *Mimnaugh v. Partlin*, 67 Mich. 391; *Robinson v. Crowninshield*, 1 N. H. 76. Mr. Freeman himself lays down this doctrine, and cites some of those cases in its support: *Freeman on Judgments*, sec. 282.

In *Schwinger v. Raymond*, 83 N. Y. 192, 38 Am. Rep. 415, the New York court of appeals held the same thing. It is true, the court attempted to distinguish that case from *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570, on the ground that in the latter the carrier had never performed his contract by transporting and delivering the goods, which were wholly destroyed en route, while in the former the carrier had performed by transporting and delivering the goods, which were only damaged en

route. But it is respectfully suggested that the distinction is untenable on principle. In both cases the contract was safely to carry and deliver the property, and in neither was the contract performed. The difference in breach was one of degree merely.

The reasoning adopted in support of the New York doctrine is equally applicable to all these cases; for it could be argued that an adjudication that the employé was entitled to recover for his services necessarily implied that he had performed them properly, and according to the contract, which would be inconsistent with the existence of a claim in favor of the employer for damages for the improper or negligent performance of the services.

The reasoning usually adopted in opposition to the New York doctrine is substantially as follows: That negligence or want of skill in the performance of services, resulting in damages to the employer, creates an affirmative cause of action in his favor the moment the negligent or unskillful act is committed; that this cause of action, like every other one, carries with it the right of the party to sue on it and put it into judgment in his own way; that one cause of action cannot, in and of itself, when merged in judgment, carry with it another cause of action, however closely the two may be connected; that, where a defendant has a cross-claim, ¹²⁶ he may set it up as a defense or counterclaim, but is not bound to do so, although the two causes of action grow out of the same contract.

It would be impracticable, as well as unsafe, to define the precise limits of this doctrine, or to lay down any rule of universal application; but, as applied to the present case (which was one in tort, arising on contract), and others strictly analogous, we have concluded that this doctrine is permissible on principle, and much the safer, more convenient, and more equitable in practice.

Order affirmed.

JUDGMENT—RES JUDICATA.—A physician sued for services, in a justice's court; the defendant answered, but withdrew his answer, and the plaintiff got judgment without contest. Held, a bar to a subsequent action by the defendant against the physician for malpractice in rendering those services: *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455. But where the defendant contracted to do a piece of work for the plaintiff by a certain time for a fixed price, and he sued the plaintiff for the price and recovered judgment by default, it was held that such judgment was no bar to an action by the plaintiff against the defendant to recover damages for failing to complete the work within the time fixed: *Davenport v. Hubbard*,

46 Vt. 200, 14 Am. Rep. 620. See, further, Talbott v. Barber, 11 Ind. App. 1, 54 Am. St. Rep. 491.

JENSON v. GREAT NORTHERN RAILWAY COMPANY.

[72 MINNESOTA, 175.]

MASTER AND SERVANT—ASSUMPTION OF RISKS.—While a servant impliedly assumes the risk of negligence by his fellow-servants, yet he does not assume any risk on account of the negligence of his master which is unknown to him; and where the negligence of the latter in retaining an incompetent or careless servant combines with the negligence of such servant, and the two contribute to the injury of another servant, the master is liable.

MASTER AND SERVANT—ASSUMPTION OF RISKS—NEGLIGENCE.—The rule that a servant impliedly assumes the risk of negligence by his fellow-servants has no application to a case where the master is negligent in employing or retaining in his service an incompetent or careless servant, who by his negligence injures another servant, having no notice of such incompetency or carelessness. In such case, the master is liable for the act of the servant whom he negligently retains.

MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.—In an action to recover for personal injury caused by negligence, a complaint to the effect that the plaintiff was injured while in the service of the defendant, by his incompetent and careless fellow-servant, whom the defendant then knew to be such, but the plaintiff did not, carelessly and negligently causing an ax to fall upon him while each was in the line of his employment, states a cause of action.

H. Steenerson and W. E. Rowe, for the appellant.

C. Wellington and W. R. Begg, for the respondent.

176 START, C. J. Appeal by plaintiff from an order sustaining a demurrer to his complaint.

The complaint alleges: That the defendant, in the month of January, 1896, was engaged in the work of constructing an ice break, made of piles, for the protection of its bridge across the Red River of the North at Moorhead. That the plaintiff, who was one of a crew of six or eight men under the charge of a foreman, was at work on a lower cross girder connecting the piles, when the defendant, by its foreman, carelessly and negligently directed another workman belonging to the crew to go, with his tools, consisting of axes, saws, and augers, upon a loose plank or staging above the plaintiff, and fasten the girders along the upper end of the piles, thereby rendering the place where the plaintiff was then working dangerous. That the defendant thereby, then and there, carelessly, negligently, and unmindful of its duties to the plaintiff, caused a certain hand ax to fall and

injure the plaintiff. "That the workman so placed and set to work over the place where the plaintiff was working was an incompetent and careless workman, and so known to be by the defendant at that time, and was unknown to this plaintiff; and said workman, while so engaged, carelessly and negligently caused an ax lying loose upon the staging as aforesaid to fall down upon the plaintiff's head, and the plaintiff was thereby seriously wounded, and cut in his head, and his skull fractured."

If this complaint states a cause of action, it is only because it alleges that the plaintiff's fellow workman who carelessly dropped the ax which injured him was incompetent and careless, and that the defendant, knowing it, retained him in its service. This is so for the reason that the act of the foreman, whether he is to be regarded as a vice-principal or otherwise, in directing the plaintiff's fellow workman to work with his tools on a loose staging over him, was not the direct cause of his injury.

¹⁷⁷ The cause of the plaintiff's injury was the act of an incompetent and careless fellow-servant in causing an ax to fall upon him. For this negligence the defendant is not liable if it was itself free from negligence in the premises; that is, if it did not knowingly retain such servant in its service. If it did, it is liable; for, while a servant impliedly assumes the risk of negligence by his fellow-servants, yet he does not assume any risk on account of the negligence of the master which is unknown to him; and where the negligence of the latter in retaining an incompetent or careless servant combines with the negligence of such servant, and the two contribute to the injury of another servant, the master is liable. Or, in other words, the fellow-servant rule has no application to a case where the master is negligent in employing or retaining in his service an incompetent or careless servant, who by his negligence injures another servant, having no notice of such incompetency or carelessness. In such a case the master is liable for the act of the servant whom he negligently retains.

Therefore the complaint in this action states a cause of action if it shows on its face that the plaintiff was injured by the negligence of an incompetent and careless fellow-servant, and that the defendant was negligent in retaining him in its service.

The complaint is to the effect that the plaintiff, while in the service of the defendant, was injured by his incompetent and careless fellow-servant (whom the defendant then knew, but the plaintiff did not know, to be such), carelessly and negligently causing an ax to fall upon the plaintiff's head while each was in

the line of his employment. The allegation that the fellow-servant was careless necessarily implies that he was habitually negligent, for a careless man is one whose nature or habit is not to take ordinary care—one who is negligent, unconcerned and heedless. The defendant, according to the allegations of the complaint, knowingly had such a man in its service, and knowingly subjected the plaintiff, who did not know that he was careless, to the risk of injury from the negligence of such a fellow-servant, whereby the plaintiff was injured. Therefore the complaint states a cause of action.

Order reversed.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—If a master knowingly employs and retains in his service an incompetent servant, an employé who enters his service in the same line of business, in ignorance of such incompetency, and who, in the exercise of ordinary care, could not discover such incompetency, does not assume the risk arising out of the negligence of the incompetent co-employé: Chicago etc. R. R. Co. v. Champion, 9 Ind. App. 510, 53 Am. St. Rep. 357; Handley v. Daly Min. Co., 15 Utah, 189, 62 Am. St. Rep. 916, and note.

SPINK & KEYES DRUG COMPANY v. RYAN DRUG COMPANY.

[72 MINNESOTA, 178.]

NEGOTIABLE INSTRUMENTS—ACTION ON CHECK—NOTICE OF DISHONOR—SUFFICIENCY OF COMPLAINT.—In an action against the drawer of a check, it is necessary to allege presentment and dishonor, but it is not necessary to allege that notice of such dishonor was given to the defendant.

McLaughlin, Boyesen & Donohue, for the appellant.

Jayne & Helliwell, for the respondent.

178 MITCHELL, J. This was an action on a bank check payable on demand, of which the defendant was drawer and the plaintiff payee. The complaint alleged due and seasonable presentment of the check to the drawee bank for payment, and its dishonor, but did not allege notice to the defendant of its dishonor, or any excuse for not giving such notice. The defendant demurred to the complaint on the ground ¹⁷⁹ that it did not state a cause of action, and from an order overruling its demurrer the defendant appealed.

The only question is, whether it was necessary to allege in the complaint that notice of the dishonor was given to the defendant. We think that it was not, and that this logically follows

from the points of difference between checks and bills of exchange, properly so called.

Defendant's counsel greatly rely on the somewhat noted case of *Harker v. Anderson*, 21 Wend. 372, in which Justice Cowen, in a very elaborate opinion, argued that a check is in all essential features a bill of exchange—a doctrine long since thoroughly overturned. A check is in many respects so like a bill of exchange (payable on demand) that it has often been termed a bill in cases in which it was unnecessary to draw any distinction between the two classes of instruments. Indeed, checks may properly be called a species of bill of exchange. But there is a well-recognized distinction between bills and checks as to the legal consequence (between the holder and the drawer) of neglect and delay in presentment and notice of dishonor.

It is true that indorsers of checks stand on the same footing in reference to the effect of such neglect and delay as indorsers of bills. But the drawer of a bill and the drawer of a check stand upon a very different footing. In the case of a bill of exchange, negligence in respect to presentment or notice of dishonor absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made on a fund deposited to meet it; and negligence of the holder in not making due presentment, or in not giving notice of dishonor, does not discharge the drawer, unless he has suffered some loss thereby, and then only to the extent of such loss. He is, at most, entitled only to such presentment and notice as will save him from loss: 2 Daniel on Negotiable Instruments, sec. 1587.

It seems to us that it logically follows that in a suit against the drawer it is not necessary to allege, as a part of the cause of action, notice of dishonor or the absence of loss by reason of the failure to give such notice. As it is a general rule of pleading that a party is not bound to allege what he is not bound to prove to establish his ¹⁸⁰ cause of action, it seems to us that whether it is necessary to plead notice of dishonor depends upon the question, upon whom is the burden of proof as to loss or no loss by reason of neglect to give such notice? It strikes us that, upon both principle and reason, it should be held that loss by reason of negligent delay, either in making presentment or in giving notice of dishonor, is a matter of defense to be pleaded and proved by the drawer, instead of requiring the holder to allege and prove a negative as to a matter peculiarly within the knowledge of the drawer.

Many of the text-books and digests cite a line of cases in support of the proposition that, where there has not been due presentment and notice, the burden of proof is upon the holder to show that the drawer has sustained no injury. But a careful analysis of these cases will show that very few of them fully sustain so broad a proposition. In almost all of them it appeared that there had been negligent delay in presenting the check, and that in the meantime the drawee bank had failed and closed its doors, and the remarks of the court were made with reference to that state of facts. It may be correct to hold that the changed condition of the drawee bank raises a presumption of loss or makes out a *prima facie* case of loss which shifts the burden of proof upon the plaintiff. But that is a very different thing from holding that the burden is on the plaintiff in the first instance to prove that the drawer suffered no loss.

In some of the cases usually cited as holding that, in an action against the drawer of a check, it is necessary to allege presentment and notice of dishonor, or a legal excuse for their omission, the only question really before the court was whether the holder of a check could have recourse upon it against the drawer until presentment and dishonor, and it was properly held that he could not, for until payment has been demanded and refused there is no breach of the drawer's contract. Moreover, all the cases hold that this demand on the drawee may be made any time before suit. But the matter of notice of dishonor stands on an entirely different footing, and constitutes no part of the plaintiff's cause of action. In none of the cases which hold that it is necessary to allege notice of dishonor do we find the question discussed at any length, ¹⁸¹ or any good reason given for the decision. In most of these cases the courts seem to have been influenced by the familiar rule pertaining to bills of exchange, and to have gone off on the exploded doctrine of *Harker v. Anderson*, 21 Wend. 372, that a check is in all respects a bill of exchange.

As the question is merely one of pleading and practice, and not of general commercial law, and is one of first impression in this state, we feel at liberty to decide it according to what we deem sound principle. Our conclusion is, that the complaint was not demurrable.

Order affirmed.

CHECKS—ACTION ON—SUFFICIENCY OF COMPLAINT—NOTICE OF DISHONOR.—A complaint against the drawer, in an action upon a bank check, must aver presentment of the check at

the bank, and notice of its dishonor given the drawer, or some fact excusing such presentment and notice: *Dolph v. Rice*, 18 Wis. 397, 86 Am. Dec. 778. That notice of dishonor must be proved, or some legal excuse shown for the absence thereof, seems to be the general holding: *Extended note to Holmes v. Briggs*, 17 Am. St. Rep. 807.

STATE v. DISTRICT COURT OF RAMSEY COUNTY.

[72 MINNESOTA, 226.]

OFFICERS DE FACTO AND DE JURE—USURPATION OF OFFICE.—The acts of a person who cannot under any circumstances become a de jure officer, and who has assumed to act officially in reference to an assessment for local improvements, and to perform certain duties which have been conferred by law upon a board of public works existing de jure, as well as de facto, at the same time, are unauthorized and void.

OFFICERS DE JURE AND DE FACTO—USURPATION OF OFFICE.—If a person who is not, and cannot be, an officer de jure, because there is not an office de jure to be filled, has intruded into and usurped the functions and performed the acts required by law to be done by officers who exist at the time, de facto as well as de jure, such law has not been complied with, and such acts are unauthorized and void.

J. E. Markham and H. W. Phillips, for the relator.

S. L. Pierce and R. A. Walsh, for the respondent.

227 COLLINS, J. The question now presented is, whether a certain assessment for local improvements in the city of St. Paul is valid when the acts in reference to such improvements, required by the city charter to be done and performed by the board of public works, have not been done or performed by such board, but, instead thereof, by a person claiming to hold the office of commissioner of public works, an office attempted to be created by the Laws of 1895, chapter 228, a statute held to be unconstitutional in *State v. Copeland*, 66 Minn. 315, 61 Am. St. Rep. 410, in which case a writ of ouster was ordered against the person in question to remove him from the alleged office.

It stands conceded that, from the time of his appointment to the so-called "office," the incumbent was recognized by the authorities of the city and exercised the functions and performed the acts and duties which had by the charter been cast upon the board of public works, a board consisting of four persons, and had practically usurped their places in all matters which had previously come before the board as provided by law. The board resisted this usurpation, and met daily for the purpose of transacting the business which under the charter was theirs to perform. This condition of affairs continued until the writ of

ouster deprived the alleged officer of all semblance of right, and, as a result, the board resumed its official labors without interference.

²²⁸ We thus have the case of a person who could not, under any circumstances, become a de jure officer (because there was not and could not be a de jure office to be filled by any one), who has assumed to act officially in reference to an assessment for local improvements and to perform certain duties which had been conferred by law upon a board of public works—a board which existed de jure as well as de facto at the same time. And it is these acts of actual usurpation which are relied upon to sustain the validity of an assessment which may result in a divestiture and transfer of real property in the exercise of an authority which must be clearly given to a municipality, and always strictly pursued.

There are many cases in the books in which the acts of de facto officers have been considered, and in many instances recognized as valid. But none have been cited which go further in the direction of sustaining the contention of counsel for the city as to the validity and sufficiency of the acts of the so-called "commissioner" than that of *Burt v. Winona etc. R. R. Co.*, 31 Minn. 472, in which this court held by a majority opinion that where a court or office has been established by a legislative act apparently valid, and the court has gone into operation, or the office has been filled and exercised under the act, it is a de facto court or office. The act there considered had created a municipal court—a thing the legislature had power to do; but, upon its passage in the senate, the act failed to receive the constitutional number of votes—a fact established by evidence aliunde. And the decision was guardedly placed upon the particular facts in hand. We do not here either approve or disapprove the *Burt* case, but in no event can it be extended in its application.

The legislative act under which the right to appoint a commissioner of public works was exercised, and under which the appointee served in the stead of rightful officers, was in itself unconstitutional, and was as inoperative as if it had never been passed. The cases which bear upon the question now before us were carefully reviewed in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, and again, recently, in *Flaucher v. Camden*, 56 N. J. L. 244, but not one can be found which is authority for the claim here made that where a person who is not and cannot be an officer de jure ²²⁹ (because there is not and cannot be an office de jure to be filled by anyone), has intruded and usurped the

functions and performed the acts required by law to be done by officers who exist at the time, de jure as well as de facto, such law has been complied with, or the unauthorized acts held valid. The agency through which the city should have acted when making the improvement—the board of public works—was disregarded and ignored, and hence the assessment was properly set aside.

Writ discharged.

OFFICERS DE FACTO.—An office cannot exist unless it is lawfully created by law. Hence, one who fills an alleged office that has no constitutional or statutory authority for its existence, cannot be recognized even as a de facto officer: *Herrington v. State*, 103 Ga. 318, 68 Am. St. Rep. 95; monographic note to *State v. Hocker*, 63 Am. St. Rep. 184.

OFFICERS DE JURE AND DE FACTO—USURPERS.—Distinction between officers de jure and de facto and usurpers: *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176, and note. An office which it is attempted to create by an unconstitutional law has no legal existence, and is without any validity. Any person who undertakes to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts are absolutely null and void. *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478. The acts of a usurper may under some circumstances be valid as to the public and third parties: *State v. Taylor*, 108 N. C. 196, 23 Am. St. Rep. 51.

RED WING v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[72 MINNESOTA, 240.]

MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING FLAGMAN AT RAILWAY CROSSING.—Under a municipal charter granting to the city "the general powers possessed by municipal corporations at common law," and conferring on such city the care, control, and management of the streets within its limits, and containing a general clause giving to the members of the city council "full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, correct, and repeal all such ordinances, rules, and by-laws for the government and good order of the city, for the suppression of vice as they shall deem expedient," neither the city nor its council has power, express, implied, or otherwise, to adopt an ordinance requiring a railway company to maintain a flagman at such street crossings as such council may require.

MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING FLAGMAN AT RAILWAY CROSSING.—A city ordinance requiring a railway company to maintain a flagman at certain street crossings is void, and not a lawful exercise of the police power of the city.

MUNICIPAL CORPORATIONS—VOID ORDINANCE—RATIFICATION BY AMENDMENT OF CHARTER.—An amendment to a city charter providing that all ordinances of such city theretofore enacted shall remain in force, does not validate an unauthorized and void ordinance.

Action to recover for the violation of an ordinance passed by the city council of the city of Red Wing, requiring the defendant railway company to maintain a flagman on its railroad crossings over certain streets. Judgment for the defendant, and the plaintiff appealed.

J. C. McClure, for the appellant.

F. M. Wilson, for the respondent.

243 COLLINS, J. Counsel for the appellant city insists that the city council had the power to enact the ordinance under which this action was brought, because: 1. Such power was expressly conferred in the "general welfare" clause; 2. Because of the implied power granted by the charter; 3. Because of the police power of the city over the streets; and 4. Because the ordinance had been expressly legalized by the legislature.

1. It is admitted that no express authority to adopt an ordinance compelling defendant railway company to station a flagman at street crossings is to be found in the charter in force at this time (Special Laws 1864, c. 6); but it is claimed that the power is conferred by a general clause (Special Laws, subc. 4, sec. 2), by which the city council was given "full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, correct, and repeal all such ordinances, rules, and by-laws for the government and good order of the city, **244** for the suppression of vice, as they shall deem expedient; . . . and such ordinances, rules, and by-laws are hereby declared to be and have the force of law, and for these purposes shall have authority by ordinance, resolution, or by-laws, provided, that they be not repugnant to the constitution and laws of the United States or of this state: 1. To license and regulate," et cetera.

Then follows a special enumeration by subdivisions of various subjects upon which the council may legislate, thirty-seven in all, the last three having reference to the subject of fires.

This general clause is not a "general welfare" clause, as counsel for the city seems to assume. It did not confer upon the city power to enact ordinances, rules, and by-laws for the general welfare of the city, but such only as were required for the "government and good order" of the city or for the "suppression of vice" within its limits. The expressions used are much more restricted, for the words "general welfare" are synonymous with "corporate purposes." Many things are essential to the public

or general welfare which belong neither to the government nor good order of, nor to the suppression of vice in, a municipality: *Horr & Bemis on Municipal Police Ordinances*, sec. 27. It is apparent from the wording of section 2, *supra*, that "for these purposes"—that is, for the government and good order of the city, and for the suppression of vice—it was enacted, that the city council "shall have . . . authority" to adopt ordinances, rules, or by-laws upon the subjects there enumerated. The legislative mind was fully directed to the different matters concerning which municipal authority was intended to be given. The exact scope and extent of municipal power and authority is to be found in these specific enumerations, and the general grant is restricted and limited by these enumerations: *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462.

The general rule of construction applicable to municipal charters is well stated in the case just cited, as follows: The existence of powers of a legislative character must be shown by an express grant, or as incidental and necessary to the proper enjoyment and exercise of such as are expressly conferred. Nothing outside or beyond this can be taken by intendment or implication. The general clause involved in the case of *Green v. Eastern Ry. Co.*, 52 ²⁴⁵ Minn. 79, found in the charter of the city of Anoka (Special Laws 1889, c. 9, subc. 4, sec. 3), was much broader than the clause now under consideration. In fact, the power of the council to adopt the ordinances there referred to seems to have been conceded. No authority can be found in section 2, *supra*, for the passage of the ordinance on which plaintiff relies.

2. Nor can the authority be implied from the fact that the charter (Special Laws 1889, subc. 1, sec. 1) granted to the city "the general powers possessed by municipal corporations at common law"; nor from the fact that the care, control, and management of the streets was vested in the city. Special power was conferred upon the council to prohibit immoderate riding or driving upon the streets. It may also be conceded that, by implication, the city had the right to regulate, by ordinance, the rate of speed at which trains should be propelled across streets and to prohibit a dangerous rate at street crossings; but it does not follow that it could require flagmen to be stationed at such places. The reasons for a distinction between an ordinance regulating the rate of speed at a street crossing and one which requires a flagman to be stationed there are stated in *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118; and what is said in that case

also disposes of the contention of counsel that the passage of the ordinance now before us was a lawful exercise of the police power of the city.

3. There is nothing in the claim that the ordinance has been legalized by Special Laws of 1887, chapter 3, subchapter 15, section 1—an amended charter. A law declaring that “all ordinances and resolutions heretofore made, adopted, or established by the city council of the city of Red Wing, shall remain in force, except as altered, modified or repealed by the city council of said city,” merely kept in force valid and binding ordinances. It did not validate an ordinance which was void because unauthorized.

Order affirmed.

MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING FLAGMAN AT RAILWAY CROSSING.—As opposed to the principal case, it is held in Georgia that a municipal ordinance regulating the speed of trains, and requiring flagmen and watchmen to be kept at crowded crossings, may be passed and enforced by a city under the general grant of police powers usually found in municipal charters: *Western etc. R. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, and note. Indiana holds the same doctrine: *Pennsylvania Co. v. Stegemeler*, 118 Ind. 305, 10 Am. St. Rep. 136.

RED WING v. GUPTIL.

[72 MINNESOTA, 259.]

NUISANCES—ABATEMENT—ACTION BY CITY.—A city authorized by its charter to abate or compel the abatement of public nuisances, has power to compel the abatement of a nuisance affecting the comfort or convenience of the public, although it is not injurious to the public health; and therefore it may maintain an equitable action to aid in compelling an abatement of such nuisance.

J. C. McClure, for the appellant.

F. M. Wilson, for the respondent.

201 **START, C. J.** This was an action by the city of Red Wing to enjoin the defendant from operating a slaughter-house and rendering establishment within the corporate limits of the city, and to require him to abate the same as a nuisance. Judgment was entered, upon the special verdict of the jury, dismissing the action on the merits, from which the plaintiff appealed.

The special verdict was to the effect that the defendant used and maintained the slaughter-house in question without any authority or license from the city of Red Wing, and conducted the business therein in such a manner as to be offensive, disagree-

able, and annoying to persons residing in the vicinity of his premises and to persons traveling along the public highway past them by reason of the smells and stenches emitted therefrom, but such house and business have not been so conducted as to be injurious to the public health. This is, in its legal effect, the equivalent of a finding that the defendant is maintaining a public nuisance, although it is not injurious to the public health: Wood on Nuisances, secs. 299, 571; Gen. Stats. 1894, sec. 5881.

A municipal corporation which by its charter is authorized to abate or to compel the abatement of public nuisances may maintain an action in equity to secure such result: *Pine City v. Munch*, 42 Minn. 342, and notes; *Buffalo v. Harling*, 50 Minn. 551. The only question in this case is, Can the city of Red Wing maintain such an action to compel the abatement of a public nuisance which is not injurious to public health? It cannot do so unless its charter confers upon it authority to remove or abate public nuisances which affect the comfort and convenience of the public, but not the public health. But if it has such power under its charter, it may maintain this action. The nuisance in question is offensive, disagreeable, and annoying to persons living or traveling along the highway in the vicinity of the defendant's slaughter-house, by reason of the ²⁶² smells and stenches it emits. It therefore affects the comfort and convenience of the public. The charter of the plaintiff (Special Laws 1887, c. 3, subc. 4), among other things, provides:

Sec. 5. "The city council shall have full power and authority to make, ordain, adopt, establish, publish, enforce, alter, amend, or repeal all such ordinances, rules, and by-laws for the government and good order of the city, . . . for the prevention of crime as they shall deem expedient, and in and by the same to declare and impose penalties and punishments by fine, imprisonment, or both, . . . and for these purposes the said city council shall have authority by such ordinances, by-law or resolution."

Subsec. 5. "To compel the owner or occupant of any cellar, tallow chandler shop, soap factory, tannery, barn, stable, privy, sewer, or other unwholesome, nauseous house or place, to cleanse, remove, or abate the same from time to time as often as may be necessary for the health, comfort, and convenience of the inhabitants of said city."

Subsec. 31. "To remove and abate any nuisance injurious to the public health, and to provide for the punishment of all persons who shall cause or maintain such nuisance."

Subsec. 32. "To remove or abate any nuisance, obstruction, or encroachment upon the streets, alleys, public grounds, or highways of the city."

Sec. 12. "The powers conferred upon the city council to provide for the abatement or removal of nuisances shall not bar or hinder suits, prosecutions, or proceedings under any general law of this state."

It is obvious from the reading of these provisions that a distinction is made in nuisances, and that the city is not authorized to deal with all alike. Those which jeopardize the public health or obstruct the public streets and grounds, the city itself may proceed summarily to remove or abate, as provided in subsections 31 and 32. This power is conferred upon the city because of the character and consequences of such nuisances. The cases are extreme, and will brook no delay. When the public health is imperiled or public travel is obstructed by the existence of a nuisance, the city may act promptly, and not wait for the slow process of securing its abatement by enforcing the penalties of an ordinance. But as to nuisances which affect the comfort or convenience of the public, but not the public health, the city is only authorized to compel the owners of the buildings or places which constitute the nuisances ²⁶³ to remove or abate them as provided by subsection 5 of its charter. There is no occasion for immediate action in such cases. The literal reading of this subsection 5 would indicate that the city could not compel the owner of such a building or place to cleanse, remove, or abate the same unless it affected the public health as well as the comfort and convenience of the public, the words of the statute being "health, comfort, and convenience." But, clearly, such is not the intention of the statute, and the word "and" should be read "or," in accordance with the rule that "or" may be read for "and" in a statute, and conversely, as the clear intent of the statute may require: *Weston v. Loyhed*, 30 Minn. 221; *Sutherland on Statutory Construction*, sec. 252.

It follows from our construction of its charter that the city of Red Wing has the power to compel the abatement of a nuisance affecting the comfort or convenience of the public, although it is not injurious to the public health, and therefore it may maintain an equitable action to aid in compelling an abatement of such a nuisance. It also follows that the trial court erred in entering judgment upon the special verdict for the defendant dismissing the action.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

NUISANCES.—MUNICIPAL CORPORATIONS have, without statutory authority, ample power at the common law to cause the abatement of a nuisance, and, if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it: *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185; *Huron v. Bank of Volga*, 8 S. Dak. 449, 59 Am. St. Rep. 769. Right of municipality to remove obstructions for the public benefit and convenience: *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474, 8 Am. St. Rep. 544.

WHITE v. LEEDS IMPORTING COMPANY.

[72 MINNESOTA, 352.]

EXECUTION SALES—INADEQUATE PRICE—DEFECT IN NOTICE—REDEMPTION.—A second mortgagee, who redeems from an execution sale, which is prior to both mortgages, cannot be deprived of the rights acquired by his redemption, upon the refunding by the first mortgagee of the amount paid to redeem, although the judgment creditor induced the first mortgagee to believe that the judgment had been paid, and the second mortgagee knew that the property was sold for an inadequate price, and that there was a defect in the notice of sale, but did not participate in the judgment creditor's fraud. In such case, the redemptioner is a bona fide purchaser, and cannot be deprived of the property rights acquired under the redemption.

EXECUTION SALES—RIGHT OF MORTGAGEE TO REDEEM.—A second mortgagee is not bound, because he knows of facts which might render an execution sale of the land upon which he has a lien voidable, to refrain from redeeming from such sale, and hazard his right of redemption on the chance that a suit would be brought to avoid such sale, and prosecuted to a successful determination.

J. A. Toun and L. Cray, for the appellants.

E. H. Canfield, for the respondent.

353 **MITCHELL, J.** The Leeds Importing Company was an Iowa corporation, consisting of only two members—Goodenough, its president, and Cooper, its secretary and treasurer. It owned a tract of one hundred and fifty-seven and one-half acres of land, worth from seventeen dollars to eighteen dollars per acre. In February, 1894, one Heron commenced an action for the recovery of money against the company, in which an attachment was issued and levied on this land. On March 31, 1894, the company executed a mortgage on the land to the plaintiff to secure the payment of seventeen hundred and thirty-eight dollars. This mortgage was duly recorded on April 2d. At the time of the execution of this mortgage, plaintiff was informed of the existence of the attachment; but the secretary of the company told

him not to give himself any uneasiness about it, that it would never bother him, that they would pay it off. On May 5, 1894, the company gave a second mortgage (in form a deed) on the same land to one Porter, to secure the payment of fifteen thousand dollars which it owed to him individually, or to a firm of which he was a member. This mortgage was also duly recorded.

On November 19, 1894, Heron obtained and docketed a judgment for one hundred and ninety-nine dollars and nine cents against the company in the action in which the attachment had been issued and levied. This was the first lien on the land, plaintiff's mortgage being the second, and Porter's the third. Execution on Heron's judgment having issued on November 28, 1894, the sheriff advertised the land for sale on January 12, 1894—an impossible date. On January 12, 1895, the land was bid off at the execution sale for one hundred and eighty dollars, by the son of Heron's attorney. A certificate of sale was executed and duly recorded. On the 17th of the same month, the purchaser at the execution sale assigned his certificate of sale to Cooper's wife. This assignment was placed on record. While Cooper transacted the business in the name of ³⁵⁴ his wife, the evidence is plenary that his wife was a mere figurehead in the transaction, and that Cooper himself was the real purchaser of, and paid the consideration for, the assignment. In an interview between plaintiff and Cooper about November 1, 1895, the court finds that "plaintiff was fraudulently advised by said Cooper, who then had in view the obtaining of this land for himself, that said claim of said Heron had been settled and paid, which statement said plaintiff believed and relied on." The evidence justified this finding.

Defendant claims that the evidence shows that plaintiff had actual knowledge of the sale on Heron's execution prior to the expiration of the period of redemption. We do not think the evidence is such as to require a finding to that effect. On the contrary, it justifies the finding that he had no such knowledge until after the expiration of the redemption period, and just before the commencement of this action. On January 6, 1896, Porter duly filed his intention as mortgagee and creditor to redeem from the execution sale; and on January 16th he did so redeem, by paying one hundred and ninety-four dollars and seventy-five cents to the sheriff, who executed to him a certificate of redemption. Shortly afterward, the plaintiff commenced this action to have the sale on the Heron execution set aside, and to foreclose his mortgage, tendering to Porter payment of

the amount, with interest, which the latter had paid to redeem. The trial court granted him the relief prayed for; and, from an order denying a new trial, Porter and the other defendants beneficially interested in his mortgage appealed.

Had there been no redemption and had the legal title under the execution sale become absolute in Mrs. Cooper, a court would make short work of this case; for Cooper's conduct indicates a fraudulent scheme on his part to cut out both plaintiff's and Porter's mortgages, and to obtain the land for himself, in the name of his wife, for about a fourteenth or a fifteenth of its value. But Porter's redemption has had the effect of defeating this scheme, and the contest is now between him and the plaintiff; the question being whether Porter should be permitted to hold the land for his ³⁵⁵ debt, which now amounts to about seventeen thousand dollars, or whether the execution sale should be set aside, and matters placed in statu quo, so that plaintiff's mortgage, on which there is now due over two thousand two hundred dollars, would again become a first lien, and Porter's mortgage a second lien, on his being reimbursed for what he paid out to redeem from the Heron lien, which was prior to those of both plaintiff and Porter.

Plaintiff, as the ground for setting aside the execution sale, relies on the inadequacy of the price for which the land was sold, the defect in the notice of sale, and the fraud practiced upon him by Cooper. His counsel seems to argue the case as if, in case the sale is not set aside, Porter would get the land for the paltry sum which he paid to redeem. This is not so. The redemption extinguishes and pays his mortgage debt to the amount of the value of the land, less what he paid to redeem: *Sprague v. Martin*, 29 Minn. 526.

Porter was not a party to, and had no notice of, the fraud perpetrated on plaintiff by Cooper. It must be presumed that he knew of the discrepancy between the value of the land and the amount for which it sold on the Heron execution; but this is not of itself suggestive of any fraud, for in this state, where both the owner and lien creditors are allowed a year in which to redeem, the amount bid at either an execution or a mortgage sale is usually determined by the amount of the creditor's claim, and not by the value of the property. This disparity between the value of the land and the amount bid constitutes the main reason why Porter should redeem.

He was also charged by the records with constructive notice of the defect in the sheriff's notice of sale; but this was not very

suggestive, in view of the statute providing that an officer's selling without giving the prescribed notice does not affect the validity of the sale, "either as to third parties, or parties to the action": Gen. Stats. 1894, sec. 5467.

The record also charged him with constructive notice that Wilson (and not the judgment debtor) had purchased at the sale, and subsequently assigned the certificate to Mrs. Cooper. But the same records which charged him with constructive notice of all these facts charged plaintiff with like notice of the same facts. ³⁵⁶ There is no evidence that he knew or had any reasonable ground for believing that plaintiff had no actual notice of these facts, or had been misled by any fraudulent representation by Cooper. On the contrary, he had a right to assume that plaintiff knew all the facts, but for some good reason did not desire to redeem. Porter was not plaintiff's guardian, and owed him no duty to look after his interests.

The situation was just this: The records disclosed a presumptively valid sale on a lien paramount to those of both himself and plaintiff. If there was no redemption, presumptively the liens of both mortgages would be extinguished. He was not required, and could not afford, to refrain from redeeming, and take the chances of the sale being set aside for some possible cause to him unknown. He did what he had a perfect legal right to do, and the only thing he could do under the circumstances, viz., file notice of his intention to redeem, and in due time redeem; there being no redemption by either the owner or the plaintiff. As such redemptioner, he became an innocent purchaser for value; and we discover no legal principle upon which he can be deprived of any of his property rights which he has acquired under his redemption.

Order reversed.

An application for a rehearing having been made, the following opinion was filed on June 17, 1898:

PER CURIAM. The gist of counsel's application for a reargument is, that the court based its decision upon the proposition that Porter, as redemptioner, was an innocent purchaser, whereas the burden was on him to prove that fact, and there was no evidence that he did not know of Cooper's fraud on plaintiff.

If this were the case of a purchaser by convention of the parties, there might be something in the point. But a redemptioner does not occupy in all respects the position of an ordinary purchaser. He is exercising a statutory right and if he does

not exercise it in the manner and at the time prescribed by statute the right is gone forever. Had Porter known of facts which might render the execution sale voidable at the suit of plaintiff, he would not have been ³⁵⁷ bound to refrain from redeeming, and hazard his right of redemption upon the chance that plaintiff would bring such a suit and prosecute it to a successful termination. As suggested in the opinion, he had a right to assume that plaintiff had the same knowledge of the execution sale as he himself had, and was entirely competent to protect his own interests.

Application denied.

EXECUTION SALES—RIGHT OF MORTGAGEE TO REDEEM. A mortgagee has the right to redeem land from a sale under execution, though the liability secured by the mortgage is a contingent one, which may never ripen into a certainty: *Crossen v. White*, 19 Iowa, 109, 87 Am. Dec. 420.

EXECUTION SALES—REDEMPTIONER—PURCHASER FOR VALUE.—One redeeming from an execution or mortgage sale is a purchaser for value of whatever interest he acquires by the redemption, as fully as if he had purchased the certificate of sale from the purchaser: *Ahern v. Freeman*, 46 Minn. 156, 24 Am. St. Rep. 206.

SWEDISH-AMERICAN NATIONAL BANK *v.* BLEECKER.

[72 MINNESOTA, 383.]

GARNISHMENT—SITUS OF DEBT—ACTION IN REM.—An action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign insurance company doing business in both states, after the loss of a building owned by defendant and insured by such company, the company being served by service on the insurance commissioner, and the principal defendant being served by publication, is an action in rem, the res being the indebtedness due from the insurance company to the defendant, which has no situs in the state where the action is brought, and cannot be seized in such action.

GARNISHMENT.—THE SITUS OF A DEBT IS, as between different states or sovereignties, at the domicile of the creditor, although the debt may, for the purpose of attachment or garnishment, be given by statute a situs also at the domicile of the debtor.

GARNISHMENT—SITUS OF DEBT.—A stipulation filed by a foreign insurance company doing business within the state in accordance with a statute, agreeing that any legal process affecting the company served on the insurance commissioner shall have the same effect as if served personally on the company, does not give such company a domicile within the state for all purposes, or bring therein the situs of a debt which it owes in another state, so as to authorize the garnishment of such debt in an action in rem within the state.

Gilfillan, Willard & Willard, for the appellant.

L. R. Larson and A. Neland, for the respondent.

³⁸⁹ CANTY, J. The defendant, a resident of North Dakota, insured his house against loss by fire in the garnishee insurance company, a foreign corporation organized in England. The house was situated in North Dakota, and was burned while so covered with said insurance. Thereupon the plaintiff, a resident of this state, brought an action against defendant to recover an indebtedness due from the latter to the former, and instituted garnishment proceedings against the insurance company, which was doing business in this state. The garnishee appeared and disclosed that it owed the defendant the insurance money due on said loss, amounting to eight hundred dollars. The defendant could not be found in the state, and the summons in the main action was served on him by publication. The garnishee summons was served on the garnishee by delivering copies thereof to the insurance commissioner, pursuant to Laws 1895, chapter 175, section 77. The plaintiff moved for judgment on the disclosure of the garnishee. The defendant appeared specially, and moved that the proceedings be dismissed on the ground that the court had no jurisdiction. Both motions were heard together. Defendant's motion was denied, and plaintiff's was granted. From the judgment entered thereon in plaintiff's favor, defendant appeals.

This is a proceeding in rem: *Aultman v. Markley*, 61 Minn. 404. The res is the indebtedness due from the garnishee to the defendant.

Appellant contends that the court had no jurisdiction, and the judgment is void, because the situs of the debt was not in this state, and therefore the courts of this state could not seize or condemn it. There is a conflict of authority as to whether, under the circumstances, the debt has a situs in this state. In the discussion of this ³⁹⁰ question, we must keep in mind two simple principles: 1. As between different states or sovereignties, the situs of the debt is at the domicile of the creditor (*Wharton on Conflict of Laws*, 2d ed., secs. 359, 363; *Story on Conflict of Laws*, 8th ed., sec. 399; *Brown's Jurisprudence*, sec. 150); 2. Statutes and the custom of London may, and often do, for the purposes of attachment or garnishment at the suit of a third person, give the debt a situs also at the domicile of the debtor.

Respondent contends that the debtor (the garnishee herein) has a domicile in this state. Said section 77 provides: "No foreign insurance company shall be so admitted and authorized to

do business until: . . . 3. It shall, by a duly executed instrument filed in his office, constitute and appoint the insurance commissioner or his successor its true and lawful attorney upon whom all lawful processes in any action or legal proceedings against it may be served, and therein shall agree that any lawful process against it which may be served upon its said attorney shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state."

The garnishee has filed such a stipulation, has established local agencies, and has been insuring property in this state. This did not, in our opinion, give the garnishee a domicile in this state for all purposes, or bring into this state the situs of debts which it owes elsewhere by reason of business transacted elsewhere. Neither the creditor nor the debtor resided in this state; none of the transactions out of which the indebtedness arose took place in this state; and the indebtedness was not payable in this state. Under these circumstances, the debt has not a situs in this state: *Reimers v. Seatco Mfg. Co.*, 37 U. S. App. 426, 17 C. C. A. 228, 70 Fed. Rep. 573; *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448; *Renier v. Hurlbut*, 81 Wis. 24, 29 Am. St. Rep. 850; *Louisville etc. Ry. Co. v. Dooley*, 78 Ala. 524; *Wright v. Chicago etc. Ry. Co.*, 19 Neb. 175, 56 Am. Rep. 747; *Keating v. American Ry. Co.*, 32 Mo. App. 293. In *Green v. Farmers' etc. Bank*, 25 Conn. 452, *Tingley v. Bateman*, 10 Mass. 343, and *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183, it is held that a debtor who is only temporarily in the state cannot be charged as a trustee or garnishee. But we need not now consider whether ³⁹¹ or not these decisions should be followed. The garnishee herein is not in the state temporarily. It is in the state permanently, or, for the purposes of this case, it is not in the state at all.

Respondent relies on *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405. That case is not at all parallel. The report of that case does not fully disclose the facts as they appear in the court's findings. One Zellar was employed as a conductor on the Great Northern Railway in running and operating its train from Minot, North Dakota, to Glasgow, Montana, and during the time of his employment resided at Glasgow. On October 23, 1891, he ceased to be so employed, and immediately thereafter changed his residence to Minot. Thereafter, on November 23, 1891, attachment proceedings were instituted against him in Montana

by a resident of that state, and the wages due him from the railway company for his last month's services were attached, and process was served on him by publication. Thereafter, on December 4, 1891, he changed his residence to Minnesota, and assigned his claim for wages to Harvey, who commenced an action in Minnesota against the railway company for the amount of the claim. The railway company was incorporated under the laws of Minnesota; but, under the laws of Montana, a railway company doing business in that state could be served with process by serving the same on its ticket agent. This court held that the Montana court had jurisdiction to seize the debt, and ordered proceedings stayed in the action in this state until the determination of the attachment proceedings in Montana. Clearly, this debt had a situs in Montana. The debt grew out of a Montana transaction between Zellar and the railway company, and was incurred in that state. For the purposes of that transaction, the railway company had a domicile in Montana, and the fact that Zellar subsequently left the state did not destroy such domicile of the railway company as regards that transaction, or destroy the situs of the debt in Montana for the purposes of attachment in that state.

It is true that this defendant might have brought an action in this state against this insurance company to recover for this loss, and might have obtained service by serving the summons on the insurance commissioner. But this does not prove that this debt ³⁹² has always had a situs in this state. In the first place, that action would be in personam, not in rem; and, for the purposes of such an action, it is immaterial where the situs of the debt is. In the next place, the creditor, by his voluntary act, may give the debt a situs also at some place other than that of his domicile. He may, so to speak, take the debt with him for the purpose of bringing a suit upon it. But a third person claiming to be a creditor of such creditor cannot do this. Such a stranger has no power to change the situs of the debt, or to give it a situs at a place where it would not otherwise have it. In our opinion, the debt in question had no situs in this state, and the court below had no jurisdiction.

The judgment appealed from is therefore reversed, and the action remanded, with directions to dismiss the same.

A petition for reargument having been filed, the following opinion was filed on June 17, 1898:

CANTY, J. On a motion for a reargument, respondent calls our attention again to the fact that *Wyeth etc. Co. v. Lang*, 127 Mo. 242, 48 Am. St. Rep. 626, follows *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, and overrules *Keating v. American R. Co.*, 32 Mo. App. 293, cited by us in the opinion herein. It is true that the *Wyeth* case purports to overrule the *Keating* case; but it merely overrules a dictum in the latter case, which dictum is to the effect that, when a debt is made payable at a certain place, it has no situs at any other place. In our opinion, each of those cases was correctly decided on the facts.

The *Keating* case is similar to this case. Neither the defendant nor the garnishee resided in Missouri. The garnishee was an Illinois corporation, which did business also in Missouri and Texas. The defendant was a resident of Texas, where he was employed by the garnishee; and the plaintiff attempted to procure service on him by publication, and to garnish his wages. The plaintiff and defendant in the *Wyeth* case were both residents of Missouri. The latter had commenced a number of actions against the former in the state of Kansas, had garnished in those actions residents of Kansas who were debtors of the former, and had obtained service ³⁹³ on the former by publication. The Missouri action was brought to restrain the prosecution of the Kansas actions on the ground that the courts of Kansas had no jurisdiction. Of course, the Kansas courts had jurisdiction, and the Missouri action could not be maintained.

The statement, in the opinion in the latter case, that the debt may be attached as the property of the creditor wherever he might maintain an action to recover it, was merely a dictum, which is true as a general rule; but, as we hold in this case, there are some exceptions to that rule. The garnishee in this case is an English corporation, which may be doing business in every state in the Union, and also in England, Ireland, Scotland, Canada, India, Australia, and a score of other countries. If respondent's position is correct, the debt here in question has at one and the same time a situs in all of those states and countries in which the corporation is doing business, and may be seized by attachment or garnishment in any of them.

The petition for a reargument is denied.

GARNISHMENT—SITUS OF DEBT.—A foreign corporation cannot be summoned as garnishee in one state to reach a debt payable by it in another state: *National Bank v. Furtick*, 2 Marvel (Del.) 35, 69 Am. St. Rep. 99, and monographic note thereto discussing fully the question of the situs of debts for purposes of garnishment.

HALL v. SAUNTRY.

[72 MINNESOTA, 420.]

JUDGMENTS—COLLATERAL ATTACK.—A judgment of a court having jurisdiction of the parties, and of the subject matter, cannot be impeached collaterally.

JUDGMENTS AGAINST RECORD OWNER—EFFECT AGAINST GRANTEE UNDER UNRECORDED DEED.—A statute providing that "every conveyance of real estate not so recorded shall be void as against any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record prior to the recording of such conveyance," is not limited in its application to money judgments in favor of creditors, but applies to any judgment affecting the title to real estate, where such title appears of record in the name of the person against whom the judgment is rendered.

Keyes & Baldwin, for the appellants.

A. T. Ankeny and Clapp & Macartney, for the respondents.

421 BUCK, J. Hall and Brown brought this action for the purpose of determining the adverse claims of the defendants to a quarter section of land situate in Itasca county. William Sauntry and wife, Frederick Weyerhaeuser and wife, and E. Rutledge and wife answered, alleging title in F. Weyerhaeuser and William Sauntry. The trial court found the following facts:

"1. That one Pierre Paul entered the land described in the complaint at the United States landoffice in Duluth, Minn., on the sixth day of October, A. D. 1873, to whom a patent was issued therefor, dated May 15, 1874, and duly recorded on the thirtieth day of October, 1883, in book G of deeds, on page 9; that the title acquired by said Pierre Paul under said entry and patent was duly conveyed to and vested in one James R. Park by warranty deed, dated October 25, 1873, and duly recorded on the fifteenth day of November, 1873, in book C of deeds, on page 159; that thereafter the title so acquired by said James R. Park was duly conveyed to and vested in the Cloquet Lumber Company by and through a warranty deed, dated May 25, 1889, and duly recorded on the eighteenth day of June, 1889, in book D of deeds, on page 212; and that the title so acquired by said Cloquet Lumber Company was duly conveyed to and vested in the said defendant E. Rutledge by and through a warranty deed, dated August 23, 1893, and duly recorded on the first day of December, 1896, in book O of deeds, on page 339; and that the undivided two-thirds of the title so acquired by said defendant E. Rutledge was thereafter duly conveyed to and

vested in the said defendants William Sauntry and F. Weyerhaeuser."

"2. That the Pierre Paul who entered said land, and to whom the patent issued therefor, died in Hennepin county, Minn., in the year 1887, and was, at the time of his death, about eighty-seven years old; and that said Pierre Paul, at the time of his death, and for twenty-five years prior thereto, was a resident of Hennepin county."

"3. That the plaintiffs claim title to the land in question under a quitclaim deed from another Pierre Paul; that the Pierre Paul under whom they claim title never resided in Hennepin county, never entered the land in question, nor authorized anyone to enter ⁴²² it for him, and was always an entire stranger to such title; that the last-named Pierre Paul is about sixty-six years old, and that he never personally received any consideration from plaintiffs for the conveyance to them of such land."

And, as a conclusion of law, the court found that the defendants were the owners in fee simple of the land described in the complaint, and that plaintiffs have not, and never had, any right, title, or interest in said land, or any part thereof; and it was ordered that judgment be entered accordingly. Plaintiffs appeal and assign a large number of errors, only part of which need be considered.

The alleged errors numbered 1 to 6, inclusive, are made upon the ground that the trial court refused to make any finding as to:

"1. Whether a person by the name of Pierre Paul commenced an action in the district court in and for Itasca county, Minnesota, against the Cloquet Lumber Company, in which action said Pierre Paul claimed to be the owner of the land in the complaint herein described, and prayed to have the title to said land adjudged to be in him, said Pierre Paul, and to have the rights of said Cloquet Lumber Company adjudged and determined."

"2. Whether judgment was rendered in said action of Pierre Paul against said Cloquet Lumber Company adjudging said Pierre Paul to be the owner of said lands."

"3. Whether a certified copy of said judgment was recorded in the office of the register of deeds of said Itasca county, Minnesota, and at what time said certified copy was so recorded."

"4. Whether, at the time of the commencement of said action of Pierre Paul against said Cloquet Lumber Company, the deed from the said Cloquet Lumber Company to E. Rutledge was recorded."

"5. Whether, at the time said judgment was rendered in said action of Pierre Paul against said Cloquet Lumber Company, said deed from said Cloquet Lumber Company to E. Rutledge was recorded."

"6. Whether, at the time a certified copy of said judgment rendered in said action of Pierre Paul against said Cloquet Lumber Company was recorded, the deed from said Cloquet Lumber Company to E. Rutledge was recorded in said county."

Upon all these points or questions there was ample evidence to require a finding of the trial court, which finding was necessarily material to the rights of the plaintiffs, but the court refused to make any finding upon any of said points or questions. We have quoted the entire finding of facts by the trial court.

⁴²³ The undisputed testimony shows that one Pierre Paul, Jr., commenced an action in the district court of Itasca county against the Cloquet Lumber Company. The summons and complaint therein are, respectively, dated January 28, 1895 (the time of service of the summons not appearing), and the answer is dated July 10, 1895. In the complaint Pierre Paul alleges that he is the owner in fee of the premises herein in dispute; that the lands are vacant and unoccupied; that defendants have, or claim to have, some interest in said land adverse to the claims of plaintiff; and prays that he be adjudged the owner in fee of said lands, free from any encumbrance or claim of defendants. The defendants answered, denying that plaintiff was the owner of said land, or that he had any interest therein; but defendants disclaimed any interest or estate in, or lien or claim on, said land. Upon a hearing of the action, September 10, 1896, in the district court of Itasca county, the trial court found that the material allegations of the complaint were true, and, as a conclusion of law, that the defendants had no right, title, or interest in the lands described in the complaint, and that plaintiff was entitled to judgment accordingly. On September 15, 1896, judgment was entered as ordered.

Thereafter, on September 25, 1896, Pierre Paul and his wife, by quitclaim deed, conveyed the premises to plaintiff Hall, which deed was duly recorded October 15, 1896, in the office of the register of deeds of said county of Itasca. Subsequently, and on November 30, 1896, Hall, by an instrument in writing, under seal and acknowledged, sold and transferred all the pine lumber on said premises to the plaintiff Brown.

It thus appears from the foregoing facts that the Cloquet Lumber Company became vested with the title in fee to the

premises on May 25, 1889, by deed from Parks, which deed was duly recorded June 18, 1889. This title remained in the Cloquet Company until August, 1893, when, by warranty deed, it conveyed said premises to E. Rutledge, who did not record said deed until December 1, 1896. It is to be noted that it was while E. Rutledge held his unrecorded deed from the Cloquet Lumber Company that Pierre Paul commenced his action against the company, had a trial thereon, and ⁴²⁴ judgment therein entered, as hereinbefore stated. This probably explains why the Cloquet Lumber Company disclaimed any ownership in the premises in its answer in the suit commenced against it by Pierre Paul, because it did not then own the premises, and had no interest therein; and it does not appear to have given Rutledge any notice of this action of Pierre Paul against it. In said action, the court appears to have had jurisdiction over the parties and of the subject matter, and judgment was entered before Rutledge placed his deed upon record, and while the title of record stood in the name of the Cloquet Lumber Company.

It is conceded by these appellants, for the purposes of this appeal only, however, that the land in controversy was patented to Pierre Paul, the father of the Pierre Paul who was plaintiff in the case of Pierre Paul against the Cloquet Lumber Company, and the grantor of the plaintiff Hall in this action, and that the said company held the record title to the land through conveyances from the senior Pierre Paul. But the effect of the former judgment of Pierre Paul, Jr., against the Cloquet Lumber Company, was to establish the title to the premises in Pierre Paul, Jr., as against the Cloquet Lumber Company, in whose name the title then stood of record, and against Rutledge, who did not record his deed until after the judgment was entered, and the conveyances were made from Pierre Paul, Jr., to Hall, and from him to Brown, and these conveyances were duly recorded. Of course, Sauntry and Weyerhaeuser, the grantees of Rutledge, have no greater rights in the property than Rutledge had upon the entry of the judgment against him in favor of Pierre Paul, Jr.

The attack in this action upon the former judgment is purely a collateral one, and it cannot be successfully assailed in this manner. If the action had been a direct one by Rutledge against Paul, Jr., under the General Statutes of 1894, section 5434, to set aside the judgment for fraud, or for any of the causes therein mentioned, a different question would have arisen; but here the attack is made and sought to be upheld as against the judgment

rendered by a competent tribunal, where the plaintiffs are the privies of Pierre Paul, Jr., and the defendants privies of the Cloquet Lumber Company. But there is no essential element or material fact in the judgment record showing want of ⁴²⁵ jurisdiction in the court, which rendered judgment upon the merits. Such a judgment is not void. Thus we have a judgment lawfully obtained, so far as disclosed by the record, at the suit of a party against the person (Cloquet Lumber Company) in whose name the title to the land appears of record prior to the recording of the conveyance to Rutledge and his privies.

The General Statutes of 1894, section 4180, and the case of *Berryhill v. Smith*, 59 Minn. 285, control this case. In that case it was said, at page 288: "There is no warrant in the language of the statute for limiting it to judgments in favor of creditors where a lien is acquired by docketing. Its language is very broad: 'Any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record.' It seems to us that this applies to any judgment determining or affecting the title of the person in whose name such title appears of record, and that any such judgment will equally affect the title of a grantee from that person under an unrecorded conveyance. . . . It is well known that judgments or decrees are often essential links in the chain of record title, the decree frequently having the effect of a conventional conveyance. In dealing with real estate, these decrees or judgments are necessarily relied on to the same extent as recorded conveyances. But if, notwithstanding a valid judgment against the party in whose name the title appears of record affecting that title, such judgment does not also affect the title of a grantee of that party under an unrecorded conveyance, then no one could ever safely deal with any property where such a judgment was one of the links in the chain of title. Such cases are clearly within the mischiefs intended to be prevented by recording acts, and we have no doubt they are within both the spirit and language of our statute."

Upon the record, therefore, we hold that the appellants were entitled to a finding by the trial court upon the questions or points which we have quoted and which are assigned as errors, and it was error for the trial court to refuse to make such finding. If there are other errors, as assigned by the appellants, they will doubtless be avoided upon a new trial, as we refuse to direct a judgment for the plaintiffs.

The order denying the motion for a new trial is reversed, and a new trial granted.

JUDGMENTS—COLLATERAL ATTACK.—The judgment of an inferior tribunal upon a matter over which it has jurisdiction cannot be assailed collaterally for errors or irregularities subsequent to acquiring jurisdiction: *Smith v. Clausmeier*, 136 Ind. 105, 43 Am. St. Rep. 311. On the collateral attack upon judgments, see the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

LIEN OF A JUDGMENT is preferred to a prior unrecorded deed, in Missouri: *Reed v. Austin*, 9 Mo. 722, 45 Am. Dec. 336. See, also, *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238.

STATE v. COOLEY.

[72 MINNESOTA, 476.]

TRIAL—GRAND JURY—DISQUALIFICATION OF MEMBER—EFFECT ON INDICTMENT.—If a grand jury is composed of not less than sixteen, and not more than twenty-three, members, as required by statute, the fact that one member is disqualified does not vitiate the action of the jury in finding an indictment, if the disqualified juror is excused before the charge is considered, and the remaining jurors, not less than sixteen, find the indictment, twelve of their number concurring therein.

TRIAL—GRAND JURY—NUMBER OF JURORS.—If the statute requires that a grand jury be composed of not less than sixteen members, and not more than twenty-three, a defendant cannot complain of an indictment found against him by a jury composed of less than twenty-three members, but not less than sixteen. In such case, there is no deficiency in the jury, and the smaller the legal number the more secure is the defendant against indictment.

TRIAL—GRAND JURY—MEMBER IRREGULARLY ON PANEL.—Mere irregularity in the proceedings by which a grand juror gets upon the panel does not affect the legality of its proceedings, if such juror is not personally disqualified.

E. T. Smith, county attorney, for the state.

G. W. Wilson and W. B. Sketch, for the defendants.

477 BUCK, J. Case certified by the district court of Jackson county to this court upon the request of all of the defendants after the court had overruled a motion on their part to set aside an indictment wherein they were charged with the crime of having unlawfully sold intoxicating liquors at the village of Heron Lake, in said county.

The facts, briefly stated, are that a grand jury was duly drawn and appeared on the first day of the term of the district court in said county, held in October, 1897, when it appeared to the court that five of said persons so appearing were not citizens of the United States or of this state, and they were then excused by

the court, and it ordered a special venire for five persons to supply the deficiency. Five persons were accordingly summoned, and they, with the other eighteen persons already summoned, were sworn as the grand jury, and after they had been in session forty-eight hours it appeared that one of their number, viz., P. C. Nelson, was not a citizen of the United States or of this state, and he was then excused by the ⁴⁷⁸ court, and no juror summoned to supply the deficiency. Thereafter the charge in the indictment was considered by the remaining twenty-two jurymen, and the indictment found and returned by them as the grand jury.

One of the twenty-two grand jurymen who found the indictment was August Lindstrum, he being present with said grand jury when the charge contained in said indictment was under consideration, and he took part in finding the same. Lindstrum's name had been placed on the previous annual list of grand jurors in January, 1896, by the county commissioners of Jackson county, and thereafter he was duly drawn and served as a grand juror at the May, 1896, term of said court. There was no legal annual list of grand jurors made in January, 1897, and in July, 1897, his name was again placed upon the annual list of grand jurors for said year, and he was drawn as a grand juror for the October term of said court, at which time he acted as a grand juror as above stated. Jackson county then contained a population exceeding ten thousand people.

Upon the foregoing facts the defendants moved to set aside the indictment, which motion was denied, and case certified according to law. Defendants claim that when Nelson was excused it created a deficiency, and that the panel should have been filled to the full number of 23.

The General Statutes of 1894, section 7170, defines what constitutes a grand jury, viz: "A grand jury is a body of men, not less than sixteen nor more than twenty-three in number, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, chosen by lot, and sworn to inquire of public offenses committed or triable in the county."

This grand jury appears to have been formed in the respect to numbers as prescribed by statute, viz., not less than sixteen nor more than twenty-three. Proffatt on Jury Trial, section 46, lays down the rule that, if the necessary minimum number are on the grand jury when an indictment is found, it will be good. Of course, under the General Statutes of 1894, section 7187, no more than twenty-three nor less than sixteen persons can be sworn on

a grand jury, and it cannot proceed to business with less than sixteen members present. By section 7232 of said statutes it is provided that no indictment can be found without the concurrence of at ⁴⁷⁹ least twelve grand jurors, and when so found it shall be indorsed, "A true bill," and the indorsement be signed by the foreman of the grand jury, whether he is one of the twelve so concurring or not. There is no pretense but that this indictment was found with the concurrence of at least twelve grand jurors, and when there were present a number of grand jurors not less than the minimum nor more than the maximum fixed by law. "The parties cannot insist upon the attendance of the full panel directed to be summoned": Thompson and Merriam on Juries, 75. In the case of *Dolan v. People*, 64 N. Y. 485, 493, it was said that the "precise number is fixed by the statute for no purpose of benefit or advantage to the persons who may be presented for indictment. The sole object of requiring this number is to secure the attendance at court of a sufficient number to constitute a grand jury."

Excusing Nelson still left six more grand jurymen than the minimum number required by law to be present when the charge was acted upon by them. This court held, in *State v. Froiseth*, 16 Minn. 277 (313), that, if not less than sixteen persons appear and are impaneled, sworn, and charged by a court, a competent jury is organized. In *State v. Causey*, 43 La. Ann. 897, it was held that "the drawing and placing of a disqualified person on a grand jury as a member thereof, and the subsequent removal of such person from it by the court, after impanelment, on objection, for proper disqualification, do not so vitiate or infect that body as to paralyze it, and blot it out of existence"; and we fail to understand how the defendant's rights could in any manner be jeopardized, or in any manner injured, by not summoning another grand juror in the place of Nelson. Their counsel say that Nelson's being excused created a deficiency, and that the panel should have been filled as provided by the General Statutes of 1894, section 7185. If counsel mean to be understood as claiming that, the greater the number of grand jurors, the less likely were the defendants to be indicted by twelve members, their contention is unsound. The reverse is exactly the case. It seems reasonable to suppose that the smaller the number of members, the less likely to find twelve members who would be ⁴⁸⁰ liable to find an indictment. In *Bishop's New Criminal Procedure*, volume 1, section 855, he says: "The smaller the number whereof the twelve are a part, the more secure is the

defendant against being indicted. The provision is in his favor. On the other hand, if it authorizes more than twenty-three grand jurors, and a finding on a vote of twelve, it increases his danger, and, in principle, it is unconstitutional."

Bishop was writing of the constitutional and legislative restrictions in fixing the number of grand jurors. To make this proposition plainer, suppose the maximum number of grand jurors was one hundred and the minimum number sixteen, and the concurrence of twelve members was required to find an indictment, would it not be self-evident that there was more danger of the defendants being indicted by the concurrence of twelve of the members than if there were only sixteen members present and acting? It needs but little reflection and an analysis of this matter to see that the defendants are complaining of a proceeding which was really for their benefit, instead of being an injury to them. Possibly, if the deficiency of five members in the first instance had not been filled, the defendants would not have been indicted. Whatever the number of the organized grand jury, twelve persons by the unwritten law, and largely by statute, are an adequate quorum for business: 1 Bishop's New Criminal Procedure, section 854 subd. 2. Hence, where the grand jury is composed of not less than sixteen members and not more than twenty-three, its action is not vitiated by reason of there being drawn as one member thereof a disqualified juror, he being excused before the charge in the indictment is considered; and the remaining grand jurors, not less than sixteen, being present when the matter before them is under consideration, may legally find an indictment.

Many causes might arise, such as death, sickness, compulsory absence, or personal disqualification of one or more jurors, whereby the number would necessarily be reduced below the maximum number, but there still remain the minimum number of sixteen or more, when it would be desirable and beneficial to the public interests to have the grand jury business proceed without delay or additional expense by attempting to fill the deficiency. While we are not unmindful of the duty which courts owe to those charged with public offenses ⁴⁸¹ to see that all proper safeguards are placed around them in criminal proceedings, yet courts do not look with indulgence upon an objection of the kind here raised, where there is no fraud or design which could result to the defendants' injury.

Lord Hale once said that the great strictness in favor of life required in points of indictments "is grown to be a blemish and

inconvenience in the law and the administration thereof; more offenders escape by the overeasy ear given to exceptions in indictments than by their own innocence, and many times gross murders "escape by these unseemly niceties, to the reproach of the law": 2 Hale's Pleas of the Crown, c. 25.

This brings us to the objection raised by defendants, that a person, viz., August Lindstrum, was permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, who took part in the finding of said indictment; he being a person other than a legally qualified grand juror.

The first thing to be noted in this respect is that no personal disqualification attached to him. We need not here recite what constitutes personal disqualification, because the question is not raised. In all respects he was a legal and qualified grand juror unless placing his name on the list in July, 1897, after his name had been on the previous annual list in 1896, made him otherwise. There is a distinction between a juror who is personally disqualified and one who possesses all the requisite qualifications, but is irregularly and improperly drawn. The general rule is, that mere irregularity in the proceedings by which a juror gets upon the panel does not affect the validity of his action: *Commonwealth v. Brown*, 147 Mass. 585, 9 Am. St. Rep. 736. In the same case it is said that nearly all the cases where verdicts or indictments have been set aside rest upon an absolute disqualification of a juror. The General Statutes of 1894, section 673, in part reads as follows: "In all counties where the population shall exceed ten thousand people, no person shall be included in such list who was included in the last previous annual list, and any person having served as a juror for one term of court shall be retired from such list, and shall not be again drawn during the same year."

The law does not personally disqualify him from serving as a ⁴⁸² juror. The county commissioners are forbidden to include him in the list where he was included in the last previous annual list, and where he has served as a juror one term of court he is to be retired from the list, and not drawn again during the same year. There is not a word or sentence by which the proceedings make him personally unfit or disqualify him as a grand juror. During all this time that the officers are forbidden to include him in the list or draw him as a juror his personal qualifications as a juror stand unchallenged. When this limitation as to time is removed, he stands, as previously, a personally qualified grand

juror. The fact that the prohibition against his further serving as a juror until after the expiration of the conditions to which we have referred seems to proceed upon the theory that he is properly a personally qualified jurymen, but that as such he cannot be drawn until after the expiration of a certain period. The statute fixing the personal qualifications of a grand juror is in no way interfered with.

"A qualified and competent grand juror, if irregularly drawn, may with his fellows find an indictment to which the defendant cannot object; for he has no interest in the manner of the drawing": 1 Bishop's New Criminal Procedure, sec. 875.

In the case of *United States v. Ambrose*, 3 Fed. Rep. 283, Swayne, C. J., at page 286, used this language: "The point that gave me most trouble in my examination of the case, and caused me to hesitate for two or three days, was the fact that one of the grand jurors named in the venire was not put into the box by any competent authority, and not drawn from it. But his name was in the venire, and there is no imputation that it was put there in bad faith. There is no light thrown upon the subject as to how, or why, or wherefore, or under what circumstances it was put there. His name was regularly in the venire, and the marshal had no choice but to serve him, and it is not contended that he had not the qualifications required by law. He assisted in finding the indictment, and it is before the court. Now, I think that this fact comes within the category of mere irregularities, which will not be permitted to vitiate the entire action of the grand jury, and I therefore say that, so far as that point is concerned, I feel warranted in overruling it."

In the case at bar, Lindstrum was listed, drawn, sworn, impaneled, and charged by the court, having power generally to perform ⁴⁸³ the duties, and he assumed to act in good faith as a competent grand juror, without any charge of evil design being at any time made against him, not even in these proceedings. A mere irregularity in placing a qualified person on the grand jury, as by drawing the name of a person generally qualified, but who had been stricken from the jury list by a vote of the town, is not fatal to the legality of the panel: *Commonwealth v. Brown*, 147 Mass. 585, 9 Am. St. Rep. 736. We are of the opinion that the proceedings by which Lindstrum was placed upon the grand jury were irregular, but do not render his act in taking part in finding this indictment invalid: *State v. Russell*, 69 Minn. 502.

Order affirmed. The case is remanded for further proceedings therein.

GRAND JURY—DISQUALIFICATION OF MEMBER—EFFECT ON INDICTMENT.—The presence of one disqualified person upon the panel invalidates all indictments found: Note to Commonwealth v. Green, 12 Am. St. Rep. 901.

GRAND JURY—MEMBER IRREGULARLY ON PANEL.—An indictment found by a grand jury, one of whose members was irregularly drawn, but who possessed all the requisite qualifications, is valid. The general rule is, that mere irregularity in the proceeding by which a juror gets on the panel does not affect the validity of his action: Commonwealth v. Brown, 147 Mass. 585, 9 Am. St. Rep. 736.

GRAND JURY—NUMBER OF MEMBERS.—An indictment found and returned by a grand jury composed of more men than is required to constitute a legal grand jury, as well as a conviction and sentence under such indictment, is without due process of law and absolutely void: Ex parte Reynolds, 35 Tex. Crim. Rep. 437, 60 Am. St. Rep. 54. Contra in Massachusetts: See the note to Commonwealth v. Green, 12 Am. St. Rep. 904.

COYNE v. MISSISSIPPI & RUM RIVER BOOM COMPANY.

[72 MINNESOTA, 533.]

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—RIGHT TO FLOAT LOGS.—A private individual, upon whom the privilege has been conferred by statute, has the right to use a navigable stream as a highway for the floating or driving of logs, and the rights of riparian owners are subordinate to this use, if reasonably exercised.

DAMAGES—EXERCISE OF LEGAL RIGHT.—If a person, in the exercise of a legal right, more especially one conferred by express statute, does an injury to another's property, he is not liable for damages, unless caused by his want of the care and skill ordinarily exercised in similar cases. This rule is applicable where the right of passage in a navigable stream is involved.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—RIGHT OF PASSAGE OR TO FLOAT LOGS IN NAVIGABLE STREAM.—The right of passage on a navigable stream is a common and paramount right, but must be exercised with due regard to the rights of riparian owners, and with ordinary care and skill. Floating logs in such a stream may cause damage to the estate of the riparian owner, but, if the party floating the logs uses due care and skill, he is not liable in damages.

J. B. Atwater, for the appellant.

E. Hammons, for the respondent.

533 COLLINS, J. Plaintiff had a verdict in an action brought to recover for injuries claimed to have been caused by reason of defendant's construction and maintenance of certain piling, piers, and booms in the Mississippi river, above

plaintiff's farm, whereby huge quantities of logs and ice were accumulated and held back in the spring of 1897, and then, because of the breaking away of the piling, piers, and booms, alleged to have resulted from defendant's negligent management and operation thereof, suddenly precipitated down the river and upon plaintiff's farm, by reason of which soil and trees along the banks were swept away and destroyed. Defendant's appeal is from an order denying its motion for a new trial, and the assignments of error go to the claim of counsel that the court should have dismissed the case when plaintiff rested; that there was ⁵³⁴ error in the admission of certain evidence in rebuttal; that the charge to the jury was erroneous in respect to the grounds upon which plaintiff could recover, and also in reference to the time up to which damages might be estimated in case damages were awarded to her.

The defendant is a corporation duly organized and acting under the provisions of Laws 1857 (Ex. Sess.), chapter 60, and several amendatory acts. Its power and authority to build and construct piling, piers, and booms in the river mentioned—a navigable stream—and its right to handle and drive logs, under its franchise, stand conceded. It was exercising a lawful privilege when it erected piling and piers and maintained its booms at the point in question, but it was bound to exercise this privilege with due regard to the concurrent rights of riparian owners above and below to the use of their lands. And, as before noticed, the cause of action set forth in the complaint was based upon an allegation of defendant's negligence in the management and operation of its works above plaintiff's farm.

A part of the evidence was directed toward establishing that a great quantity of logs and ice gathered at defendant's piling, piers, and booms, causing a jam, and then broke loose, rushing down in a mass, and tearing and washing out more or less of the soil along the shores of the stream, where it flowed through the farm; and a part was produced for the purpose of showing that defendant was careless and negligent in the management and operation of its booms, and carelessly and negligently allowed the jam to form, and then to break; and the court charged the jury upon this branch of the case. But it went further, and charged, in substance, that if the tearing and washing away of the soil along the shores were caused by the obstructions placed in the river by defendant, and this result might have been foreseen by an ordinarily prudent man, this constituted a taking of plaintiff's property, within the meaning of the law, for which

defendant would be liable without regard to its negligence or carelessness in maintaining or operating its works. To this part of the charge defendant's counsel duly excepted.

We infer that the court relied upon the case of *Weaver v. Mississippi etc. Boom Co.*, 28 Minn. 534, when using this ⁵³⁵ language. But the facts are not at all similar, for in that case it appeared that the company built its piers and hung its booms on *Weaver's* land, and directly invaded and appropriated it, not only by those acts, but by flooding with water, and casting quantities of logs and drift thereon, which, remaining when the water subsided, destroyed the usefulness of the land. It was with reference to these facts that it was held that there had been a taking of plaintiff's property by defendant, for which compensation could be recovered. It was not a mere consequential injury to plaintiff's land which was under consideration in the *Weaver* case, but a physical invasion and appropriation by a defendant who was not exercising a legal right when so doing. The authority relied on is not in point.

The defendant, in the exercise of its corporate franchise, and to facilitate its authorized work of handling and driving logs in a navigable river, constructed its piling and piers, and then hung booms—one extending from an island on the east side of the main channel to the east shore; the other, from an island on the west side of said channel to the west shore; leaving the main channel, between the two islands, unobstructed. Logs were pocketed in both of these booms, but the latter did not give way, nor did the logs escape. The injuries complained of resulted from the jam which formed in the channel between the islands while defendant was lawfully handling and driving the logs from above. As the river was a navigable stream, the public, as well as defendant under its charter, had the right to use it as a highway for the floating or driving of logs; and the rights of riparian owners were subordinate to this use, if reasonably exercised: *Doucette v. Little Falls etc. Nav. Co.*, 71 Minn. 206.

The doctrine stated in 1 *Hilliard on Torts*, 103, thus, "If a party, in the exercise of a legal right—more especially one conferred by express statute—does an injury to another's property, he is not liable for damages, unless they were caused by his want of the care and skill ordinarily exercised in like cases," is the one applicable where the right of passage in a navigable stream is involved. The right is a common and paramount one, but must be exercised with due regard to the rights of riparian owners. The use of the stream must ⁵³⁶ be reasonable, and must be ex-

exercised with ordinary care and skill, such as the great mass of mankind would exercise under like circumstances when driving logs. The party using the highway is not an insurer, but he must not be negligent and careless. Floating logs may cause damage to the estate of the riparian owner; but, if the party floating or driving the same uses due care and skill, he is not liable for such damage.

"Land on navigable streams is subject to the danger incident to the right of navigation, and where logs are driven in a stream in an ordinarily careful, prudent manner, the owner is not liable for damage which may result to the riparian owner": *Field v. Apple River etc. Co.*, 67 Wis. 569; *Harold v. Jones*, 86 Ala. 274; *White River etc. Co. v. Nelson*, 45 Mich. 578; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Hollister v. Union Co.*, 9 Conn. 436, 25 Am. Dec. 36; *Lansing v. Smith*, 8 Cow. 146; *Thompson v. Androscoggin*, 54 N. H. 558.

The gravamen of an action of this kind is defendant's negligence, and the charge was incorrect. We need not consider other alleged errors.

Order reversed.

WATERS—RIPARIAN RIGHTS.—THE RIGHT OF FLOATAGE in public navigable streams is general, but the rule which makes private streams subservient to floatage is based on their natural surroundings, and rests on convenience, if not on necessity: *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527, and note. Riparian owners hold their lands subject to the right of the public to use the navigable rivers flowing through them as public highways, and to improve such rivers as public highways by any appropriate means, whenever this can be done without taking private property: *Brooks v. Cedar Brook etc. Improvement Co.*, 82 Me. 17, 17 Am. St. Rep. 459.

WATERS—DAMAGES FOR OBSTRUCTION BY LOGS.—One who uses a stream for the purpose of floating logs is not answerable to a riparian proprietor for the jamming of logs together so as to form a gorge, retarding the flow of water, and submerging the plaintiff's lands, unless it appears that the defendant was guilty of a want of ordinary care and prudence in the conduct of his business, and that the damage to the plaintiff was suffered because of such lack of care: *Hopkins v. Butte etc. Co.*, 13 Mont. 223, 40 Am. St. Rep. 438; *Witheral v. Muskegon etc. Co.*, 68 Mich. 48, 13 Am. St. Rep. 825.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

BROWN v. WEAVER.

[76 MISSISSIPPI, 7.]

ARREST OF MISDEMEANANT—PREVENTION OF ESCAPE—LIABILITY FOR SHOOTING.—The shooting of a misdemeanor by an officer in order to arrest him, or to prevent his escape after arrest, is wrongful and unauthorized.

ARREST OF MISDEMEANANT—LIABILITY OF OFFICER'S SURETIES FOR SHOOTING.—A misdemeanor, who has been shot by an officer, or his deputy, in attempting to arrest him under a warrant, or in attempting to prevent his escape after arrest, may maintain an action for damages on the officer's official bond.

Critz, Beckett & Leverett, for the appellant.

J. A. Pinson and Alexander & Alexander, for the appellees.

13 **WHITFIELD, J.** The appellant had been arrested by the deputy sheriff in a bastardy proceeding, and had escaped from the deputy sheriff, without violence, simply running away from him, and, whilst merely running away, was, by the deputy sheriff, shot, on the notion that he had a right to shoot and kill him, if necessary, to prevent the escape at the time. Appellant sustained very serious injuries, and suffered greatly for a long time, and is probably permanently disabled. He brings this suit for damages against the sheriff and the sureties on his bond, on the ground that the deputy was guilty of "misconduct" in shooting him under the circumstances, and that his act was done *virtute officii*. Can the action be maintained?

Our statute, section 1152 of annotated code of 1892, in enumerating the cases in which homicide is justifiable, provides that it shall be so, if committed in (c) "retaking any felon who

has been ¹⁴ rescued or has escaped"; (d) "in arresting any felon fleeing from justice"; or (g) "when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed." It nowhere authorizes the killing of a misdemeanor in order to arrest him, or to prevent his escape after arrest. And we understand the authorities as conclusively showing that the common law did not authorize the killing of a misdemeanor in either of said cases: *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68 (and authorities there cited), a finely reasoned case, to which we especially refer. In this case the court say, approving *State v. Sigman*, 106 N. C. 728, that "where a prisoner has already escaped, no means can be used to recapture him which would not have been justifiable in making the first arrest, and that, if in pursuing him the officer intentionally kills him, it is murder." And again the court said: "The only question presented by the latter instruction is, whether or not an officer, having in his custody a prisoner accused of a misdemeanor, may take his life if he attempts to break away, where, in the language of the court's charge, 'no other means are available' to prevent his escape. A resort to a measure so extreme in cases of misdemeanor was never permitted by the common law: 1 East's Pleas of the Crown, 302. That law has not, it is believed, lost any of its humanity since the time of the writer we have just cited, and, without legislative authority, the severity of a remote age ought not to be exceeded in dealing with those who are accused of smaller offenses."

In *United States v. Clark*, 31 Fed. Rep. 710, Mr. Justice Brown, now of the United States supreme court, says: "The general rule is well settled by elementary writers upon criminal law that an officer, having a person charged with felony, may take his life if it be absolutely necessary to do so, to prevent his escape, but he may not do this if he be charged simply with a misdemeanor, the rule of the law being that it is better that a misdemeanor escape than that human life be taken." This is cited in *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68, and that court then proceeds: ¹⁵ "It has been said that the officers of the law are clothed with its sanctity and represent its majesty: *Head v. Martin*, 85 Ky. 480. And the Criminal Code has provided for the punishment of those who resist or assault them when engaged in the discharge of their duties. But the law-making power itself could not, under the constitution, inflict the death penalty as the punishment for a simple misdemeanor, and it would ill become the majesty of the law to sac-

rifice a human life to avoid failure of justice in the case of a petty offender, who is often brought into court without arrest and dismissed with a nominal fine. It is admitted that an officer should not attempt to kill one who flees to avoid arrest for misdemeanor, although it may appear that he can never be taken otherwise. If he runs, then, before the officer has laid his hands upon him, with words of arrest, he may do so without danger to his life; but, if by surprise or otherwise, he be for a moment sufficiently restrained to constitute an arrest, and then break away, the officer may kill him if he cannot overtake him. Such is the effect of the argument and of the rule in support of which it is made. We can see no principle of reason or justice on which such a distinction can rest, and we therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. In making the arrest or preventing the escape the officer may exert such physical force as is necessary on the one hand to effect the arrest, by overcoming the resistance he encounters, or, on the other, to subdue the efforts of the prisoner to escape; but he cannot, in either case, take the life of the accused or inflict upon him great bodily harm, except to save his own life or to prevent a like harm to himself."

In *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626, it is said: "It is considered better to allow one guilty only of a misdemeanor to escape altogether than to take his life. . . . The prisoner doubtless acted under the belief which erroneously prevails as ¹⁶ to the rights of a public officer—that is, that he may lawfully kill a prisoner if he fails to obey his command to halt. This is a very erroneous and very fatal doctrine, and must be corrected."

In *Head v. Martin*, 85 Ky. 480, it is said at page 483: "To permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse and take the offender. The reason for this distinction between killing in the case of a felony and misdemeanor is obvious. The security of person and property is not endangered by a petty offender being at large, as in the case of a felon. The very being of society and government requires speedy arrest and punishment of the latter." And, again, at page 485: "So careful, however, is the law as regards human life, that if even the felon

can be taken without the taking of life, and he be slain, it is at least manslaughter; even as to him it can be done only of necessity." And this is the doctrine of our court in *Jackson v. State*, 66 Miss. 95, 14 Am. St. Rep. 542. To the same effect are *State v. Sigman*, 106 N. C. 728; *Spencer v. Moore*, 2 Dev. & B. 264; *State v. Roane*, 2 Dev. 62.

Counsel for appellee cites the text of Mr. Bishop in his work on Criminal Procedure, third edition, volume 1, section 161, but it is shown conclusively in *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68, that the two cases cited by Mr. Bishop (*Caldwell v. State*, 41 Tex. 86, and *Wright v. State*, 44 Tex. 645), are not in point. In 1 Bishop on Criminal Procedure, fourth edition, section 161, paragraphs 1, 2, notes 1, 4, page 91, Mr. Bishop reviews and criticises the cases of *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626, and *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68, stating that, in the first case, the court which cited his *New Criminal Law*, volume 2, sections 648, 649, as supporting its view, failed to note that in these sections he was only speaking of an officer killing a misdemeanor "flying from arrest" originally, and not one "resisting arrest or attempting an escape." He criticised *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68, as unsound, and calls it "an unfortunate decision." ¹⁷ In note 1, at page 91, he cites *State v. Sigman*, 106 N. C. 728, as supporting the view that an officer may kill a misdemeanor who attempts to "break away" from the officer, and thus escape. In *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68, the Arkansas supreme court, as we think correctly, shows that the decision in *State v. Sigman*, 106 N. C. 728, is correct, but that the language of the court in that case is inconsistent with the decision and the general line of reasoning in the case.

In Mr. Bishop's *New Criminal Law*, eighth edition, section 647, paragraph 3, note 1, Mr. Bishop cites *Jackson v. State*, 76 Ga. 473, to the proposition that "after an arrest, whether for felony or misdemeanor, or during an imprisonment, the life of the prisoner may be taken, if necessary to prevent the escape." That was the case of a guard killing a convict in the penitentiary, who, he supposed, was trying to escape. It supports the proposition that an officer may kill a convicted felon trying to escape from imprisonment for felony, but it furnishes no support to the doctrine that an officer may kill a misdemeanor who is merely effecting his escape after arrest, or from imprisonment for mere misdemeanor, by simply running away. If Mr. Bishop

means merely to say that when a misdemeanor, after arrest, tries "to break away," violently resisting or assaulting the officer, the officer may kill him, as in self-defense, to prevent the infliction of a felony upon himself, the doctrine is sound, and not in conflict with the cases he criticises. But if he means to say, as we understand him, that an officer may kill a misdemeanor whom he has arrested, and who eludes the officer, and gets away from him without resisting the officer, and without employing any force, while such misdemeanor is effecting his escape merely by running away, then such doctrine is not sound, in our judgment, and is unsupported by the authorities: 3 Russell on Crimes, 6th ed., 132, Holroyd, J., saying: "An officer must not kill for an escape, where the party is in custody for a misdemeanor." McLain, in his Criminal Law (1897), section 298, approves *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626, criticised by ¹⁸ Mr. Bishop, and lays down the doctrine we have announced, and points out the very distinction we have just above drawn, as being the only ground of support for Mr. Bishop's doctrine, saying: "It is probable, however, that even as to preventing escape, the officer is justified in taking life only to prevent escape for felony, or where, the offense being a misdemeanor, in resisting force with force, his own life is put in peril, and not where he takes life merely to prevent escape of one charged with a misdemeanor." Substituting for "where his own life is put in peril," where, in killing, he does so to save his own life, or prevent the infliction of a felony upon himself, this is the sound doctrine.

The Kentucky supreme court well says in such a case (*Head v. Martin*, 85 Ky. 486): "He has no more right to kill him [that is, when he is merely running away] than he would have if the offender were to lie down and refuse to go with him."

Our own court has held, in *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93, "That no trespass upon the personal property of another will authorize the killing of a human being, and that any such killing would be murder, if committed with a deadly weapon." And even that in the case of a fleeing felon, the officer must satisfy the jury "that he tried, in good faith, and with reasonable prudence and caution, to make the arrest, and was unable, because of the flight of the person, to secure him, and that he resorted to the severe means employed when other proper means had failed and when, as determined by the state of things, as between him and the fleeing felon, the arrest could not be

made without a resort to the means employed": *Jackson v. State*, 66 Miss. 95, 14 Am. St. Rep. 542.

It is held in *Head v. Martin*, 85 Ky. 486, that one arrested in a bastardy proceeding is to be regarded as one arrested for a misdemeanor, although the nature of the proceeding is a civil one. It must be clear, from these authorities, and many others cited in the brief of the learned counsel for the appellant, that the deputy sheriff had no right to shoot Brown, and that he was ¹⁹ guilty of "misconduct" in so doing. Whether, however, the bastardy proceeding is to be so treated, in all respects, as a civil suit, or whether one arrested in a bastardy proceeding is to be dealt with as if arrested for a misdemeanor—so far as the point under discussion is concerned—is obviously immaterial under the authorities.

We now turn to the second branch of the inquiry, whether the sheriff and the sureties on his bond are liable for this "misconduct," as having occurred in the line of duty of the deputy sheriff—as having been done *virtute officii*. The deputy sheriff had a warrant, and under that warrant had arrested Brown, and manifestly he shot him under the notion that, having such warrant and having arrested him, he had the right to shoot him to prevent his escape, when he was merely running away.

The condition of the sheriff's bond is (Code 1892, sec. 3055), "that he shall faithfully perform all the duties of said office during his continuance therein." Section 4114 of the code provides plainly that the sheriff and his sureties shall be liable for "any misconduct" of his deputy, and may have judgment over against the deputy and his sureties for the amount of any judgment awarded against the sheriff and his sureties for such "misconduct" of the deputy. Section 4113 provides the same remedy for the sheriff against his deputies and their sureties for ordinary acts and defaults in office which the creditor may have against the sheriff. Section 4114 provides for "misconduct" of the deputy, and the liability of the sheriff and his sureties therefor. It is well settled that "the deputies are all servants of the sheriff, and, in law, they are considered but one person": *Smith's Sheriffs*, 21.

In *Murfree on Sheriffs*, section 60, it is said, quoting from *Knowlton v. Bartlett*, 1 Pick. 273: "If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable. If it was not an official, but a personal act, it is equally clear that he is not answerable. But an official act does not mean what a deputy might lawfully do in the

20 execution of his office; if so, no action could ever lie against the sheriff for the 'misconduct' of his deputy. It means, therefore, whatever is done under color or by virtue of his office." And the author then adds: "To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ, but, if he is acting under color of his office, and professes so to act, and induces others interested to believe he acted *colore officii*, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bond if they are only to be held when the acts are legal; they vouch for his acts, and bind themselves to make good any damage he may cause to anyone while acting under color of his office."

It is not necessary in this case to say anything as to what might be the result if the deputy really had no warrant, and simply stated that he had one, and was merely professing to act under color of his office, without being armed with the warrant required by law, since, in this case, it is clear that he did have such warrant, that he arrested Brown under the warrant, and that he shot him when merely running away after arrest, on the idea, clearly, that he had the right to shoot and kill, if necessary to prevent his escape, sought to be effected merely by running away. We are of the opinion, therefore, that the deputy was acting by virtue of his office; that what he did was done as an official act, and that the sheriff and his sureties are liable for the damages. Without burdening this opinion with quotations, we cite the following authorities as sustaining this proposition, in addition to Murfree on Sheriffs, cited above: Smith on Sheriffs, 21; Thomas v. Kinkead, 55 Ark. 502, 29 Am. St. Rep. 68; Yount v. Carney, 91 Iowa, 564, where it is held "that the arrest by the deputy, being in the line of his official duty, though illegal because in excess of his duty, was nevertheless a breach of the conditions of his bond": Dishneau v. Newton, 91 Wis. 201; Warren v. Boyd, 120 N. C. 60; State v. Wolford, 11 Ind. **21** App. 392; Lammon v. Feusier, 111 U. S. 17; Spencer v. Moore, 2 Dev. & B. 264.

In Robertson v. Sichel, 127 U. S. 515, the case went upon the idea that the collector of customs was not liable for the tort of a subordinate, committed in the discharge of duties which it would be "utterly impossible for the superior officer to discharge in person." No such impossibility exists in the case of the sheriff as to the arrest of a person. That case is easily distinguishable from this on its facts, and it is expressly said that

the decision there does not interfere with the liability of an officer "for the act of the deputy, performed in the ordinary line of his official duty prescribed by law," and the latter is the case here. Nor is there anything in *Brown v. Moseley*, 11 Smedes & M. 354, or *Furlong v. State*, 58 Miss. 717, at all in conflict with anything herein announced.

On return of the case to the court below, it will be proper to amend, so as to bring suit in the name of the state of Mississippi, for the use of T. J. Brown. No objection was made in the court below on this ground. In this case the suit was brought in the name of the real party in interest, and that distinguishes this case from *Nixon v. Dillard*, 73 Miss. 803, even viewing that case as looked at by a majority of the court therein.

Judgment is reversed and cause remanded.

ARREST OF MISDEMEANANT—PREVENTION OF ESCAPE.—

A peace officer, in making an arrest for misdemeanor, or preventing the escape of the misdemeanor, may exert such physical force as is necessary to effect his purpose, but he is not justified, in either case, in taking the life of the accused, nor can he inflict upon him great bodily harm, except to save his own life, or prevent a like harm to himself: *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68; *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20.

Sheriffs—Liability of Sureties for Personal Injury Inflicted by Officer.

A peace officer, whether he be a sheriff or constable, having arrested a person accused of a misdemeanor, cannot lawfully kill him, or inflict a bodily injury, to prevent his escape, although no other means of prevention are available, and, if he or his deputy inflict a bodily injury upon the misdemeanor under such circumstances, though holding a warrant for his arrest, the sureties on the official bond of the sheriff and constable are liable in damages: *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68. This case was an action against a constable, and the sureties on his official bond, to recover for the wrongful killing of one Thomas, by Jesse F. Heard, a deputy of such constable. The complaint averred, and the proof showed, that the act of killing was committed under color of a warrant for the arrest of Thomas, to answer for a misdemeanor charged against him, and that it was done wantonly and without cause: *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68. In *State v. Walford*, 11 Ind. App. 392, it appeared from the complaint that one Walford, a constable, had a warrant commanding the arrest of one Thomas; that he did, under color of his office as such constable, undertake to execute said warrant, and arrest said Thomas; that in executing it he did "carelessly, negligently, and intentionally, without cause or reason, and without any notice to said Thomas that he was an officer, or had a warrant or authority to make arrests, and without

any warning to said Thomas, with a pistol loaded with powder and ball, did shoot, wound, and injure the said Thomas, from which injuries the said Thomas subsequently died." The court held that such act on the part of the officer was wrongful, and that he was liable therefor in damages on his official bond. The court further held that there was no legal distinction in such case between acts done by color of office and acts done by virtue of office: *State v. Walford*, 11 Ind. App. 392. The sureties on the official bond of a constable are liable for his illegal acts in making an arrest under a warrant, especially when the party arrested is brutally and willfully assaulted and bodily injury inflicted: *Cash v. People*, 32 Ill. App. 250.

In *Huffman v. Koppelkom*, 8 Neb. 344, it was held that the sureties on the official bond of a sheriff were liable for his wrongful act in inflicting injuries upon the complainant in making his arrest. In this case the court said: "The second objection to this petition, and the one most relied upon in this argument, is that an action can be maintained on an official bond only for injuries done *virtute officii*, and not for acts done *colore officii* merely, and so we believe the law to be according to the best authorities. But, admitting the law to be as claimed by counsel for the defendants, still, we think the petition states a cause of action. It is true that by one allegation the pleader says the act complained of was done by the sheriff, 'under color of his said office,' but, on examination of the petition, we find facts alleged which show most positively that it was done *virtute officii*. The petition, after reciting that one Charles Clark had been lawfully committed to the jail of Dodge county, of which the said Koppelkom, as such sheriff, was the jailer, and that while so in custody, and held by a mittimus in due form of law, the said Clark had escaped, and was then at large, subject to arrest by said sheriff, proceeds as follows: 'And the plaintiff further avers that the said Koppelkom, being sheriff as aforesaid, and having then and there the said writ of mittimus as aforesaid, did not execute the said writ according to law; but, on the contrary thereof, to wit, on the seventh day of July, 1878, at and within the said county of Dodge as such sheriff, acting under said writ of mittimus, and under color of his said office, did carelessly, unfaithfully, forcibly, and wrongfully, and unlawfully, and violently seize, arrest, and lay hold of the said plaintiff, and did then and there shoot, wound, bruise, and break the left leg of the said plaintiff.' We are of opinion that the facts alleged constitute a cause of action": *Huffman v. Koppelkom*, 8 Neb. 348. In a later case in Nebraska, it was held that the sureties on the official bond of a sheriff could not be held liable for his wrongful act in making an unlawful arrest outside the state, as such act was not done by virtue of his office: *Kendall v. Aleshire*, 28 Neb. 707, 26 Am. St. Rep. 367.

It is the duty of a sheriff to exercise reasonable care for the protection of the life and health of any person lawfully placed in his

custody, and he and his sureties are liable on his official bond for the breach of such duty, provided such bond is conditioned generally for the faithful performance of the duties of his office, and it is no defense that the acts charged in the complaint also constitute a crime: *State v. Gobin*, 94 Fed. Rep. 48. In this case, the wrongful acts charged were that the sheriff carelessly and negligently suffered and permitted a mob of persons to collect for the purpose of doing violence to a prisoner confined in a jail under control of such sheriff, who aided and abetted such mob by certain specified acts in accomplishing their unlawful purpose, whereby the prisoner was taken from the jail and hanged until he was dead: *State v. Gobin*, 94 Fed. Rep. 48. But exactly the contrary doctrine is laid down in *State v. Wade*, 87 Md. 529, where it was distinctly announced that the sureties upon a sheriff's bond were not liable for a wrong committed by him in aiding and abetting a mob in lynching a prisoner regularly committed to his custody. In such case, the sheriff may be punished by indictment, but no civil action can be maintained against him. The court said: "We will add that even if it had been charged that the sheriff acted maliciously, the official bond of that officer could not be held liable in a case like this; the liability of the sureties is that of an express contract that the sheriff 'shall well and truly execute the office of sheriff, and in all things thereto appertaining, and should well and truly perform all the duties required by law to be by him performed.' This provision, it seems now to be well settled, 'binds the officer affirmatively to the faithful execution of his office. There is no clause to cover an abuse or usurpation of power, no negative words that he will commit no wrong by color of his office, nor do anything not authorized by law'": *State v. Wade*, 87 Md. 544. The sureties on the official bond of a chief of police cannot be held liable for his acts in receiving and detaining in the city prison persons arrested without process by police officers, as such acts are not done by virtue of his office and, at most, under color of office: *Marquis v. Willard*, 12 Wash. 528, 50 Am. St. Rep. 906. A surety who undertakes for the faithful performance of the official duties of a sheriff or constable is not liable for the trespasses or violence of the officer, or injury inflicted by him, when he acts without actual or apparent legal authority: *Allison v. People*, 6 Colo. App. 80; *McLendon v. State*, 92 Tenn. 520. In *Allison v. People*, 6 Colo. App. 83, the court said: "The warrant under which the constable assumed to act was absolutely void. It gave him no authority whatever to arrest Prisk or anybody else. All the acts under it were trespasses, for which he was, and is most undoubtedly, responsible. It is this conclusion which relieves the sureties of any responsibility in the premises. The constable's acts were not performed by him while engaged in the discharge of the duties of his office, nor was the arrest of the plaintiff in any sense a breach of the obligation into which the sureties had entered. Being without a legal process, he had no official

functions to perform, and no duty to execute. It is somewhat singular that in the multitude of suits which have been brought on the bonds of constables, sheriffs, and other peace officers, there have been so few cases where there has been an attempt, under similar circumstances, to hold the sureties liable for the trespasses of the officers. The industry of counsel, and some little research on the part of the court, have brought to light but few wherein the question has been considered. There is no dissent among the authorities, and they all concur in the conclusion that for trespasses of this description, where the officer acts without either actual or apparent legal authority, a surety who undertakes for the faithful performance of the official duties of the officer cannot be made responsible: *Allison v. People*, 6 Colo. App. 83. Under the statute of North Carolina, the sureties on the official bond of a constable are liable for the false imprisonment of a person by a constable without process or color thereof: *Warren v. Boyd*, 120 N. C. 56.

AMES v. DORROH.

[76 MISSISSIPPI, 187.]

SURETYSHIP—GUARDIAN'S BOND—STATUTE OF FRAUDS.—A surety on a guardian's bond is, within the contemplation of the statute of frauds, a creditor of the principal in such bond for all sums he is required to pay, because of the suretyship, from the date of the execution of the bond, though no default occurs until long afterward. The liability, whenever happening, relates back to the date of the contract.

FRAUDULENT CONVEYANCES—VOLUNTEERS—MALA FIDE PURCHASERS—TRUSTEES.—A debtor who gives no specific security for the payment of his debts is deemed in equity as holding his property in trust for his creditors, and any conveyance of it by him, without consideration, or mala fide, though upon consideration, is void as to his creditors, and, as to them, he is considered the owner of such property, and all grantees thereof, who take as volunteers, or without consideration, or who take with notice of the trust, are in equity trustees ex maleficio of such property, and may be made to answer to creditors for it or for its value.

FRAUDULENT CONVEYANCES—EXISTING INDEBTEDNESS WHEN NOT CONSIDERATION.—Although the grantor is indebted to the grantee at the time of the execution of a deed, this does not constitute a consideration for the deed, unless the grantee assents that the conveyance shall go in satisfaction of the debt.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF.—If a debtor is unable to pay a debt when called upon by his creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyance of his property is fraudulent and void, and the burden of proof is upon his grantee to show that the debtor, at the time of the conveyance, retained other specific property readily accessible, and ample for the discharge of all his debts.

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS.—If conveyances are set aside as fraudulent as to existing

creditors, such conveyances must also fail as to subsequent creditors.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.

A voluntary conveyance from a husband to his wife is void as to his sureties on his previously executed official bond for all defaults occurring during the term for which the bond is given.

C. B. Ames, for the appellant.

J. E. Rives, for the appellee.

193 TERRAL, J. J. F. Ames and others, the children and widow of C. B. Ames, deceased, filed their bill in the chancery court of Noxubee county against Ella H. Patty, Z. T. Dorroh, J. L. Patty, and Mrs. A. L. Jarnagin, to set aside certain alleged fraudulent conveyances, and to subject certain property therein described to the alleged equities of complainants. The bill alleges that C. B. Ames, in August, 1888, conveyed all his property, by voluntary conveyance, to his widow and children, the complainants herein, and immediately departed this life; that said C. B. Ames, in December, 1883, became one of the bondsmen, in the sum of fifteen thousand dollars, of R. C. Patty, as clerk of the chancery court of said Noxubee county for the term of four years, commencing the first Monday of January, 1884, and that in December, 1887, said C. B. Ames again became one of the bondsmen, in the sum of fifteen thousand dollars, of said R. C. Patty, as chancery clerk of said Noxubee county for the ensuing term of office of four years, commencing on the first Monday of January, 1888; that said R. C. Patty was the clerk of the chancery court of said Noxubee county continuously from the first Monday of January, 1884, until the thirty-first day of December, 1890, when he departed this life, utterly insolvent; that, commencing in January, 1887, certain matters of trust were committed to said R. C. Patty, by virtue of his said office of chancery clerk aforesaid, by which he became liable on his official bond for his defaults in said matters of trust in the sum of seven thousand seven hundred and seventy-six dollars and sixty-nine cents, and that complainants have been compelled to pay said sum of seven thousand seven hundred and seventy-six dollars and sixty-nine cents to discharge the obligation their said ancestor, C. B. Ames, assumed on behalf of said R. C. Patty.

194 The bill further alleges that R. C. Patty, on the twenty-fifth day of December, 1883, in consideration of natural love and affection, and of one dollar, executed a conveyance to his wife, Ella H. Patty, of the west half of the northwest quarter of section 25, and northeast quarter of section 26, of township 15,

range 17 east, in said Noxubee county, but that said deed of conveyance was not filed for record until the first day of January, 1885 (a copy of which is filed as exhibit E to the bill); that, on the 10th of August, 1887, said R. C. Patty, and the coheirs of said R. C. Patty in the estate of his deceased father, John W. Patty, in making partition of said estate of his deceased father, and for the purpose of executing the agreement for the partition thereof between them, conveyed to said Ella H. Patty, as the share of said R. C. Patty therein, and for the recited consideration of two thousand dollars, "that certain lot in block 7 in the town of Macon, in said county and state, conveyed to their ancestor, John W. Patty, by a deed from E. H. Cogburn, dated October 10, 1879, and recorded on page 333 et seq. of book 12 of the records of deeds of said county" (a copy of which conveyance is filed as exhibit F to said bill); that on July 1, 1891, Mrs. Ella H. Patty became the administratrix of the estate of said R. C. Patty, deceased, with Z. T. Dorroh and J. L. Patty as her sureties on her administration bond; that on the 4th of October, 1893, a suit was brought against Ella H. Patty and her said sureties on said bond; that on the 31st of March, 1894, Ella H. Patty executed, for the benefit of said Dorroh and Patty, her said sureties, and to save them harmless on her said administration bond aforesaid, a trust deed on the real property described in exhibits E and F to complainants' bill; that on the twenty-seventh day of May, 1895, said trust deed was foreclosed, when Z. T. Dorroh and Mrs. A. L. Jarnagin purchased the property described in exhibit F to the bill of complaint, and Z. T. Dorroh and J. L. Patty purchased the property described in exhibit E to the bill of complaint; that the conveyances (copies of which are marked as exhibits E and F to the ¹⁹⁵ bill of complaint) were voluntary and were executed without valuable consideration, and were, therefore, void as to the creditors of said R. C. Patty, and that Z. T. Dorroh and J. L. Patty and Mrs. A. L. Jarnagin had notice of the pendency of this suit before the purchase of said property at said trust sale aforesaid, and that each of them had actual notice before said sale of the claim of complainants in reference to said property, as set out in their bill in this behalf.

The complainants allege that the conveyances of the property described in exhibits E and F to the bill of complaint are fraudulent in law as to them, because, as they say, they were voluntary and without consideration, and because, at the time of their execution, C. B. Ames, their ancestor, had in equity a right

to look to said property in exoneration of his suretyship of said R. C. Patty, and the bill prays that they be exonerated of the payment of said seven thousand seven hundred and seventy-six dollars and sixty-nine cents, by subjecting the property described in exhibits E and F to its reimbursement to them, and that the conveyances of said property to Mrs. Patty, and by Mrs. Patty to Dorroh and Patty, and all subsequent conveyances thereof, be canceled. The respondents say they are bona fide purchasers of said property described in exhibits E and F to the complainants' bill, and they especially insist that the conveyances of the said property described in exhibit F to Ella H. Patty was for a valuable consideration, and that both it and the conveyance of the property described in exhibit E were made long before any defaults occurred on the part of R. C. Patty as a fiduciary in the trusts confided to him, and when the said R. C. Patty was solvent, and that said conveyances to said Ella H. Patty are good and valid in law, and that the respondents have the legal title and equity superior to that of the complainants in and to said property; that even if the conveyance set out as exhibit F to complainants' bill had been without consideration, yet said R. C. Patty, at the time of its execution, was amply able, in conformity with the law of the ¹⁹⁶ land, to make such a gift to his wife without injury to his creditors, and that the same is good and valid in law.

It appeared from the evidence that defaults of said R. C. Patty, to the extent of several thousand dollars, occurred in 1887, and before the first Monday of January, 1888, and that defaults for the remainder of the sum, aggregating seven thousand seven hundred and seventy-six dollars and sixty-nine cents, occurred after the execution of the bond of said R. C. Patty as chancery clerk, in December, 1887. By the laws of the state of Mississippi the official bond of R. C. Patty, as clerk of the chancery court of Noxubee county, operated as a security for the guardianship and other fiducial trusts committed to him by the chancery court of said county, and he and his sureties were liable thereon. It is a settled rule of law that the surety on a guardian, administration, or other fiducial obligation, is, in contemplation of the statute of frauds, a creditor of the principal in such bond from the date of its execution, though no default occurs until long afterward. The liability, whenever happening, relates back to the date of the contract; and so it must be in this case, that C. B. Ames was a creditor of R. C. Patty for all sums of money subsequently paid by complain-

ants for defaults of said Patty occurring after December 24, 1883, and before the first Monday of January, 1888: Choteau v. Jones, 50 Am. Dec. 463; Greer v. Wright, 52 Am. Dec. 117; Yeend v. Weeks, 104 Ala. 330, 53 Am. St. Rep. 50.

In equity every person who gives no specific security for the payment of his debts is deemed as holding his property in trust for his creditors, and any conveyance of it by him, without consideration, or mala fide if upon consideration, is void as to his creditors, and as to them, he is considered the owner of such property, and all grantees thereof, who take as volunteers, or without consideration, or who take the same with notice of the trust, are considered in equity trustee ex maleficio of such property, and may be made to answer to creditors for said property or for its value: Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533; Bump on Fraudulent Conveyances, 14.

197 That the conveyance by Mr. to Mrs. Patty of the property described in exhibit E was voluntary and without consideration is plain, and we think it equally clear that the conveyance of the property described in exhibit F was voluntary and without consideration. It is true R. C. Patty was owing Mrs. Patty two thousand dollars, but no acquittance was given therefor, nor was there any understanding that the conveyance was to discharge said debt. It is impossible for Patty to have paid his wife a debt of two thousand dollars by conveying property to her, except with her consent. Her right was to have the two thousand dollars, unless she had consented to take property in payment of it. There is no evidence of such consent in this case. The claim that Patty was able to make a gift of these properties to his wife, as being a suitable provision for her, because he had ample other property to discharge all his debts, cannot be maintained. A debtor being unable to pay a debt when called upon by the creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyances of property is considered fraudulent and void, and it is incumbent on the party holding such property, and insisting upon such claim, to show that such debtor, at the time of conveyance, retained other specific property, readily accessible, and ample for the discharge of all his debts, and this burden has not been met in this case: Edmunds v. Mister, 58 Miss. 776; Hagerman v. Buchanan, 14 Am. St. Rep. 750; Wilson v. Kohlheim, 46 Miss. 366, 367.

The respondents are volunteers; they are not bona fide purchasers for value. They had notice of the equity of complain-

ants before the sale under their trust deed, and the prior equity of complainants give them the better right to enforce the trust, which equity, for their protection, impresses upon the property in controversy: *Bump on Fraudulent Conveyances*, 483.

Where conveyances are set aside as fraudulent as to existing creditors, it usually follows that such conveyances fail as to subsequent creditors, and, under the circumstances of this case, we are of the opinion that the conveyances herein attacked ¹⁹⁹ are void as to the complainants to the full sum of seven thousand seven hundred and seventy-six dollars and sixty-nine cents, paid by them: *Thomson v. Dougherty*, 12 Serg. & R. 448; *Coolidge v. Melvin*, 42 N. H. 510; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732; *Carlisle v. Rich*, 8 N. H. 44; *Bump on Fraudulent Conveyances*, 314, 317.

Wherefore the decree of the chancery court is reversed, and the case is remanded, to be proceeded in according to the principles herein announced.

SURETYSHIP—FRAUDULENT CONVEYANCE.—The liability of a surety on an administrator's bond, or other contingent obligation, makes him a creditor, within the provisions of the statute of frauds, from the date of the contract, and, though he has no cause of action until he has paid the debt, he is entitled to protection against fraudulent conveyances executed by the principal debtor in the meantime: *Yeend v. Weeks*, 104 Ala. 331, 53 Am. St. Rep. 50; extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 744.

FRAUDULENT CONVEYANCES—VOLUNTARY.—The question of voluntary conveyances and their relation to the creditors of the grantor is fully treated in the monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739-754.

FRAUDULENT CONVEYANCES.—A SALE made by a vendor for the purpose of paying his debts is not fraudulent: *Weaver v. Nugent*, 72 Tex. 272, 13 Am. St. Rep. 792. Such consideration to support a sale must be something more than the discharge of a debt that revives when the consideration for its discharge fails: *Hurd v. Bickford*, 85 Me. 217, 35 Am. St. Rep. 353, and note.

FRAUDULENT CONVEYANCE—SALE FOR VALUABLE CONSIDERATION—BURDEN OF PROOF.—A conveyance made upon a valuable consideration by a debtor who is insolvent can be set aside by creditors only upon proof by them that the purchaser participated in or knew of the purpose on the part of the debtor to place his property beyond the reach of his creditors, or had such information as charges him with notice of that purpose: *Simmons v. Shelton*, 112 Ala. 284, 57 Am. St. Rep. 39. See, as to voluntary transfer between husband and wife, where the rule does not apply, and where the burden is upon the transferee: *Carson v. Stevens*, 40 Neb. 112, 42 Am. St. Rep. 661.

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS. A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent, as well as prior, creditors though the grantee did not know of, nor participate in, the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind.

662, 55 Am. St. Rep. 210, and note; see, also *Cole v. Brown*, 114 Mich. 396, 68 Am. St. Rep. 491, and note.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.—A conveyance from a husband to his wife cannot, under the California statute, be adjudged fraudulent solely on the ground that it was not made for a valuable consideration: *Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73; *Campbell v. Remaly*, 112 Mich. 214, 67 Am. St. Rep. 393.

STATE v. REED.

[76 MISSISSIPPI, 211.]

RAILROAD COMPANIES—EXCLUSION OF HACKMEN.—A railroad company cannot confer upon one person the exclusive privilege of entering its inclosed grounds to solicit the hack transportation of incoming passengers, and exclude all others from such inclosure who wish to engage in such business. Such privilege tends to create a monopoly.

McWillie & Thompson, for the Alabama & Vicksburg Railway Company, appellant.

R. L. McLaurin, for the appellee.

219 *WOODS, C. J.* Joseph Reed, the appellee, was arrested upon affidavit charging him with trespassing upon private premises belonging to the Alabama & Vicksburg Railway Company, and was, before the justice of the peace, tried and convicted. He appealed from that conviction to the circuit court of Warren county, and was there tried upon an agreed statement of facts, and was, by the judgment of that court, acquitted of the charge and discharged. From this judgment of the circuit court the state prosecutes this appeal.

From the agreed statement of facts it appears that the depot of the railway company in the city of Vicksburg is surrounded by a fence, and that there is a "considerable inclosure of grounds adjacent thereto." It further appears, also, that "within said inclosure around the depot is the most convenient and best place for hackmen and 'busmen to discharge, solicit, and receive passengers departing and arriving on the passenger trains of said company, and that any hackman or 'busman who had the exclusive privilege of entering this inclosure and soliciting passengers there would have an advantage over hackmen or 'busmen excluded therefrom, so far as passengers arriving on said trains was concerned."

220 These facts, moreover, appear in the agreed statement, viz.: That the railroad company granted, in June, 1894, the exclusive privilege of entering said inclosure and soliciting passen-

gers therein to said Peine, and that Peine was a person engaged in the hack, 'bus, and general transfer business in Vicksburg, and that, after said exclusive grant to Peine, all other hackmen and 'busmen were excluded from entering said inclosure for the purpose of soliciting passengers therein, and were notified not to enter said inclosure for that purpose, under threat of being prosecuted as trespassers; that the appellee, Reed, after having been notified not to enter said inclosure for such purpose, drove his hack into the inclosure, and while therein solicited and received a passenger, and then drove away, and that in doing this he created no disturbance or disorder; that Cherry street is about one hundred and fifty feet from the depot, and that from the depot to Cherry street, where hacks, other than Peine's can stand, there is a good sidewalk. In a word, Peine's hacks have the exclusive privilege of entering the inclosure surrounding the depot and soliciting incoming passengers, while all other hacks are excluded from the inclosure and must stand outside and about one hundred and fifty feet from the depot, and in an open street.

It is admitted in the agreed statement any hackman or 'busman having the exclusive privilege of entering said inclosure and soliciting passengers there would, to that extent, have an advantage over hackmen or 'busmen excluded therefrom, so far as concerned incoming passengers.

The agreed statement of facts distinctly states the question to be decided by us, and to that we must confine ourselves. Says the agreed statement: "It is contended that the said company had the right to make the said contract, and thus exclude the defendant and others than the said Peine from the said inclosure, and to grant to the said Peine the exclusive right to enter the said inclosure for the purpose of there soliciting passengers for his hack line. Defendant controverts this ²²¹ position, in so far as it is claimed that the said company can grant the exclusive right to any particular person to enter the said inclosure with his hack and there solicit passengers, and contends that the railway company must exclude all, or admit all into the said inclosure, so long as they conduct themselves in an orderly and peaceable manner."

The single issue is thus sharply defined, viz., Has a railway the right to confer upon one hackman the exclusive privilege of entering with his hacks its inclosed station-house grounds, and of soliciting incoming passengers, and to exclude all others from the inclosure, such privilege conferring advantages upon

the favored hackman and discriminating against all other hackmen by forbidding them to enter the inclosure to solicit passengers, and by placing the hacks of those excluded one hundred and fifty feet from the depot, and in an open street? The question has never before been presented in our courts, but it is by no means a new one, and has been passed upon in other jurisdictions.

Quite independently of constitutional or statutory provisions, it seems to be the prevailing doctrine in the United States that a railroad company may make any necessary and reasonable rules for the government of persons using its depots and grounds; yet it cannot arbitrarily, for its own pleasure or profit, admit to its platforms or depot grounds one carrier of passengers or merchandise, and at the same time exclude all others.

The question is one that affects not only the excluded hackmen; it affects the interest of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconveniences and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To ²²² concede the right claimed by the railway in the present case would be, in effect to confer upon the railway company the control of the transportation of passengers beyond its own lines, and, in the end, to create a monopoly of such business, not granted by its charter, and against the interests of the public. These are the views ably urged in *Kalamazoo Hack Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693; *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 18 Am. St. Rep. 745; *Cravens v. Rodgers*, 101 Mo. 247; *McConnell v. Pedigo*, 92 Ky. 465. These are the views held, too, by the three dissenting judges in the case of *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35-41, 9 Am. St. Rep. 661. The majority of the judges in that case held that a railroad might grant to one an exclusive right to solicit the patronage of incoming passengers, but this is the only American case making that distinct holding, and that opinion was delivered by four judges, the other three members of the court vigorously dissenting, and with better show of reasoning, in our judgment. The cases of *Barney v. Oyster Bay etc. Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115, *Fluker v. Georgia R. R. etc. Co.*, 81 Ga. 461, 12 Am. St. Rep. 328, and *Cole v. Rowen*, 88

Mich. 219, do not present the precise point involved in the case before us. They are all decisions of other questions and can be readily distinguished from the case in hand.

Counsel for appellant think that in *Cole v. Rowen*, 88 Mich. 219, the supreme court of Michigan has swung away from the doctrine announced in the earlier case of *Kalamazoo Hack Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693. But that very able court did not so think, and was careful to disabuse the mind of counsel, who seems to have the notion which counsel here puts forward, and the court clearly distinguished the two cases.

We are of opinion that the railway had no right to exclude Reed, the appellee, from its depot and inclosed grounds, on the facts appearing in the agreed statement on which the case is submitted to us, and hence that the action of the court below in discharging Joseph Reed was correct.

Affirmed.

RAILROADS—RIGHT TO DISCRIMINATE BETWEEN HACKMEN.—A railroad company cannot, upon any pretense, except wrong or misconduct on the part of the person excluded, grant to one hackman the exclusive right to occupy a place upon its depot grounds, nor can it set aside the most favorable part of such grounds to a hack and omnibus company engaged in carrying passengers and freight, to the exclusion of others engaged in the same business. A grant of such privilege is an unjust discrimination, tending to defeat competition and to create a monopoly: *Kalamazoo Hack etc. Co. v. Sootsma*, 84 Mich. 194, 22 Am. St. Rep. 693, and extended note thereto. *Contra*, *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661.

STATE v. WILEY.

[76 MISSISSIPPI, 282.]

CRIMINAL LAW—PROFANITY, WHAT CONSTITUTES.—To constitute profanity, it is not necessary that the name of the Deity should be used.

Indictment for violation of a statute prohibiting anyone from profanely swearing or cursing in any public place in the presence of two or more persons. The trial court instructed the jury that the expression, "You are a damned rascal and a damned liar," did not constitute such profanity. Defendant was acquitted, and the state appealed.

W. N. Nash, attorney general, for the state.

282 WHITFIELD, J. The court erred in striking out the words set out as having been stricken from the instruction for

the state. Says the court ²⁸³ in *Gaines v. State*, 7 Lea, 410, 40 Am. Rep. 64, 65, through the learned Judge Cooper: "It is not absolutely necessary that the name of the Deity should be used"—that is to constitute profanity—"any words importing an imprecation of divine vengeance, or implying divine condemnation, so used as to constitute a public nuisance, would suffice": Citing cases. See, to the same effect, 2 Bishop's New Criminal Law, sec. 79, subd. 1, and 2 Am. & Eng. Ency. of Law, 1st ed., 424, the note where the authorities are collated. The very words here stricken out were held to constitute profanity in *Holcomb v. Cornish*, 8 Conn. 375.

The court, therefore, erred in its holding as to what constituted profanity.

CRIMINAL LAW—PROFANITY.—The utterance of the name of God is not necessary to constitute profane swearing: *Gaines v. State*, 7 Lea, 410, 40 Am. Rep. 64.

INDEPENDENT ORDER OF THE SONS AND DAUGHTERS OF JACOB v. ALLEN.

[76 MISSISSIPPI, 326.]

ASSOCIATIONS—CONCUBINE AS BENEFICIARY—EXCLUSION OF CHILDREN.—A person named as beneficiary in a certificate of membership in a benevolent benefit society is entitled to the amount due at the death of the member, to the exclusion of his children, although the beneficiary named was the concubine or mistress of the member during his life, when, by the declarations of the articles of incorporation, by-laws, and constitution of the society, the sum due the beneficiary shall be disposed of as the member shall direct.

John Henderson, a member of a benefit society, named one Love Lucas, his mistress, as his beneficiary in his certificate of membership. After his death, his infant children, through their guardian, filed a bill in the present action, making Love Lucas and the said benefit society parties, alleging that the sum due under the certificate of membership should be paid to such guardian for the benefit of the complainants, on the ground that the illicit and improper relations existing between Love Lucas and John Henderson during his lifetime prevented her from being a competent person to take as beneficiary, as such relations were at variance with the objects and purposes of the society. Judgment in favor of the guardian, and the society and beneficiary named appealed.

Shelton & Burnini and Dabney & McCabe, for the appellants.

H. Dickson, for the appellees.

332 WOODS, C. J. The third section of the declaration of incorporation of the order is as follows: "3. To establish and maintain a benefit fund—not more than one thousand dollars—to be paid at the death of each third degree member in good standing, to his or her family, or disposed of as he or she shall direct, but the death benefit shall be limited to assessment per capita till each assessment reaches one thousand dollars."

The third section of the second article of the constitution of the order is in these words, viz.:

"Sec. 3. To promote benevolence by establishing a benefit fund, from which a sum, not more than one thousand dollars,
333 shall be paid at the death of each third degree member in good standing, as he or she may have directed; provided, however, that the death benefit shall be limited to the assessment per capita until each reaches one thousand dollars."

It is thus clearly seen that the member was entitled to designate any beneficiary in the certificate of membership, both by the declaration of incorporation and the constitution of the order. By the certificate itself the order contracted to pay the amount due at the death of the member to such person or persons as are named on its face as beneficiaries. The third section of the second article of the constitution does not name the family of the member, nor does the certificate of membership. The third article of the declaration of incorporation speaks of the fund being paid to the family, but it adds "or disposed of as he or she shall direct."

Language could not well be broader or more explicit, and there are no restrictive words limiting the beneficiary to the family anywhere to be found. It is plainly a contract between the order and the member to pay the sum realized from an assessment to any beneficiary designated by the member, or, in the absence of any designation, to the family of such member.

The words employed in the certificate of membership, and in the charter and constitution, or words of similar import, have repeatedly received judicial construction, and uniformly, almost, it has been held "that the words 'as he may direct,' or others of similar import, confer upon the member a general power of designating as beneficiary any person or persons whom he may choose": *Gentry v. Supreme Lodge etc.*, 23 Fed. Rep. 718, and cases there cited. See, to the same effect, *Mitchell v. Grand*

Lodge etc., 70 Iowa, 360; Massey v. Mutual Relief Soc., 102 N. Y. 523; Maneely v. Knights of Birmingham, 115 Pa. St. 305.

We are of opinion that Love Lucas is entitled to the benefits conferred by the certificate of membership.

Reversed and remanded.

ASSOCIATIONS—BENEFIT—BENEFICIARY OF MEMBER.—Where there is nothing in the statute of the state, the charter, or by-laws of the organization restricting the power of appointment, the member may designate whomsoever he pleases as his beneficiary, and no one can question his right to do so: Extended note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 788; Sabin v. Phinney, 134 N. Y. 423, 80 Am. St. Rep. 681.

ST. CLAIR v. KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY.

[76 MISSISSIPPI, 473.]

PLEADING AND PRACTICE—DEMURRER.—The validity of a contract cannot be considered on the hearing of a demurrer to a declaration averring that such contract was never assented to.

RAILROAD COMPANIES—QUARANTINE—DAMAGES—SUFFICIENCY OF COMPLAINT.—A passenger may maintain an action against a railway company for damages sustained from quarantine regulations, under a declaration alleging that the company's agents informed such passenger that he could go through to his destination on the ticket sold him without hindrance from quarantine regulations, that he relied on such statements, that such agent knew that quarantine regulations were then in force, that he never signed nor assented to the stipulations in his ticket, did not know of their existence, and that he was prevented from reaching his destination by quarantine officers and employés of the railroad company.

Blair & Anderson, for the appellant.

J. W. Buchanan, for the appellee.

477 WHITFIELD, J. The demurrer admits it to be true that "the stipulations in the ticket plaintiff never signed or assented to, and that plaintiff never knew of their existence until recently," et cetera. The ticket (made an exhibit) shows it was never signed. But the demurrer admits also that no such contract was ever "assented to." That is the end of the argument on this point. The case of Alabama etc. Ry. Co. v. Holmes, 75 Miss. 388, was a case which went to the jury on proof that such a contract was made. It was wholly out of place when cited in support of a demurrer which admits that no such contract was

ever "assented to." But, further, the demurrer admits that the employes and officers of the Louisville & Nashville Railroad Company aided the quarantine officers in the alleged wrongful treatment, and that "when plaintiff bought his ticket from the agent of defendant the said agent informed plaintiff that he could go through on said ticket to the city of Tallahassee without hindrance from quarantine regulations or other causes; that the quarantine regulations of no state he had to pass through ⁴⁷⁸ would hinder him; that the ticket was not sold subject to quarantine regulations; that plaintiff believed and relied on these statements of the agent; that these statements were the cause of his buying said ticket and attempting the route he did when other routes were then available to him; that at the time he bought the ticket the same quarantine regulations were then in force in the state of Alabama that were in force when he reached Montgomery, and that all this the agent knew when he sold the ticket, and of all this the plaintiff was ignorant." All this the demurrer admits. It is perfectly manifest that this was a case for plea and proof—not for a demurrer.

Reversed, demurrer overruled, and remanded.

QUARANTINE REGULATIONS.—On the general question of liability for damages caused by the enforcement of quarantine regulations, see the extended note to *Hurst v. Warner*, 47 Am. St. Rep. 548.

COFFEE v. LOUISVILLE & NASHVILLE RAILROAD CO.

[76 MISSISSIPPI, 569.]

RAILROAD COMPANIES—BAGGAGE—RULES.—A rule of a railway company that baggage shall not be checked until a ticket has been procured is a reasonable regulation, but a rule that a baggage master shall not receive into the baggage-room baggage until a ticket shall have been procured is an imposition upon the public, unreasonable, and void.

Action to recover damages for ejection from a railroad train. C. C. Coffee, desiring to go from Mobile to Scranton, requested the baggage agent at Mobile to check his satchel to Scranton, but the agent refused to do so until Coffee had procured a ticket. The ticket office being closed, Coffee left his satchel with the baggage agent. Afterward, when he called for his satchel, it could not be found, and was not found in time for him to procure a ticket before taking the train, and he boarded

the train without buying a ticket. When the conductor called for his fare, Coffee explained the circumstances, and offered to pay three cents per mile for his passage, and, upon refusal to pay four cents per mile demanded by the conductor, he was forcibly ejected from the train. Judgment for the defendant under peremptory instructions from the court. Plaintiff appealed.

Denny & Woods, for the appellant.

Mayes & Harris and G. L. Smith, for the appellee.

573 WHITFIELD, J. The case should have gone to the jury. A rule that baggage shall not be checked until a ticket has been procured is a reasonable regulation to prevent imposition upon the company. But a rule that a baggage master shall not receive into the baggage-room baggage until a ticket shall have been procured, if there be such a rule, is an imposition upon the public, unreasonable and void. It would require intending passengers to care for their own baggage in many situations that may readily be imagined where to do so would be entirely impracticable. Every reasonable facility for travel should be afforded those who are intending passengers, and rules should be so framed as to be just in their provisions alike to the company and the traveling public. As to the authority of the baggage master, see *Isaacson v. New York etc. Co.*, 94 N. Y. 285, 286, 46 Am. Rep. 142.

Reversed and remanded.

RAILROADS—BAGGAGE ACCEPTED BEFORE PURCHASE OF TICKET.—A railway company whose baggage-man accepts baggage from an intending passenger before his purchase of a ticket, contrary to the rule of the company, is liable for its loss without regard to that fact: *Lake Shore etc. Ry. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 819; *Woods v. Devin*, 13 Ill. 747, 56 Am. Dec. 483.

YELLOWLY v. BEARDSLEY.

[76 MISSISSIPPI, 613.]

TRUSTS — TRUSTEE'S SALES — NOTICE — INSUFFICIENCY.—A mere reference in a notice of sale under a trust deed to the page of the record for a description of the premises to be sold, without more, and without naming the grantor or grantee, and signed by a substituted trustee, is not a sufficient description of the land to be sold, and a sale thereunder is void.

TRUSTS — TRUSTEE'S SALES—NOTICE.—ESSENTIALS of a notice of sale under a trust deed are a statement of the time, place, and terms of sale, and such a description of the property to be

sold as, if read by persons familiar with the neighborhood, will advise them of what is to be sold and upon what terms it can be bought.

TRUSTS—TRUSTEE'S SALES—NOTICE.—THE PURPOSE of notice of sale under a trust deed is not only to notify the mortgagor, but the public that the property may bring a fair price.

TRUSTS—TRUSTEE'S SALE—NOTICE—RIGHT OF SUBSEQUENT MORTGAGEE TO QUESTION.—Subsequent mortgagees, or those holding under them, can question the sufficiency of a notice under which a sale is made under a prior trust deed.

W. H. Powell and Calhoon & Green, for the appellant.

F. B. Pratt, for the appellee.

⁶¹⁹ **WHITFIELD, J.** The notice of the sale in this case does not describe the land to be sold otherwise than by reference to the pages of the record where the trust deed was recorded. Counsel for appellant cite 2 Pingree on Chattel Mortgages, section 1347, page 1253, note 4, to show that this is sufficient. The case cited is Fitzpatrick v. Fitzpatrick, 6 R. I. 64. That volume is not in our library, but we have found the case in 75 Am. Dec. 681, where we also find, at page 701, the case of Hoffman v. Anthony, 6 R. I. 282, with note. In Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, not only was there a reference to a recorded plat, but the lot is also particularly described in the notice. In Hoffman v. Anthony, 6 R. I. 282, 75 Am. Dec. 701, "the lots of land were sufficiently described in the advertisement," and the court held the notice void because it was not "signed by anybody, and did not name the mortgagor or mortgagee," and made improper reference to the record. In the note to this case (75 Am. Dec. 706), the case of Candee v. Burke, 1 Hun, 546, is referred to as holding the doctrine contended for by appellant. But the point in that case was whether the notice was void because it omitted the name of the mortgagee, under a statute of New York, and it is said: "The mortgage was in all other respects correctly described." And the court puts the decision not on that ground even, but (pages 549 and 550) on the ground that the purchaser was not a party to the suit. This case cites Judd v. O'Brien, 21 N. Y. 186, for support, but in this case the property was described in the notice as "being in the village of Penn Yan, in the county of Yates, known and designated as 'canal lot No. 17.'" In Bacon v. Northwestern etc. Ins. Co., 131 U. S. 258, the contention was simply as to the effect of the misspelling of the mortgagee's name in a notice, under the statutes of Michi-

gan. And, in *Wilson v. Page*, 76 Me. 279, the notice particularly ⁶²⁰ describes the land. It will thus be seen that none of the authorities relied on by appellant sustain the proposition that, independently of any statute, a mere reference, in a notice of sale in a trust deed, to the page of the record for description of the premises to be sold, without more, not naming grantor or grantee, and signed by a substituted trustee, is a sufficient description of the land to be sold. On the contrary, the precise question was adjudicated the other way in *Reeside v. Peter*, 33 Md. 120. The court said: "The authority by which the property is sold, a description thereof full enough to be understood by the public, its popular name, if any, its proximity to other known property, the name of the occupant at the time, or any other prominent characteristics, may all or either afford means of informing the public and others concerned of the identity of the premises. This notice does not state even from or to whom was the deed of trust, but merely refers to the book, among the land records of the county, where that may be found." And the sale was held void.

The same rule is approved in Mr. Freeman's splendid note to *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 288. He says: "Manifestly, the objects to be accomplished by a notice of sale are to advise the public of what is to be sold, and the time when, and the place where, and the terms upon which it may be bought; and the essentials of a notice of sale under a trust deed are, therefore, a statement of the time, place, and terms of sale, and such a description of the property to be sold as, if read by persons familiar with the neighborhood, will advise them of what is to be sold, and upon what terms it can be bought, and induce them to attend the sale as prospective bidders, should they feel an inclination to invest in the property to be sold." And he concludes by saying that, "under ordinary circumstances, it is indispensable in a notice of sale to set forth the time and the place of sale, and a correct description of the property." The purpose of notice is not only to notify mortgagor, but the public, that the property ⁶²¹ may bring a fair price: 2 Perry on Trust, secs. 608o-608r; 26 Am. & Eng. Ency. of Law, 901, 902; note to *Warren v. Tiffany*, 9 Abb. Pr. 66.

We think it clear that the notice was wholly insufficient, and the sale void. Many reasons readily occur to the legal mind why such a description, by reference only, will not do. It would open the door wide to the grossest frauds. But it is said the defect in the notice was not pleaded specifically in the

answer. This is true, but is immaterial, as the decree must be reversed on another ground. On the remanding of the case, the chancery court should allow the defendants, upon request to that end, to amend their answer, so as to set up specifically insufficiency of the notice.

It is said the subsequent mortgagee has no right to make the defense of no notice, and such gross inadequacy of consideration as to amount to fraud in the sale. But if, as held in *Yates v. Mead*, 68 Miss. 787, "in a controversy between junior lienor and senior mortgagee, who has taken the mortgaged property under an absolute conveyance in satisfaction of his mortgage debt, the burden of proof is on the latter to show that such debt was equal to the value of the property taken, and that, the equity of redemption being worthless, no harm resulted to the junior lienholder," then surely the subsequent mortgagee has an equity to insist that the sale shall not be so managed as fraudulently to sacrifice the property to which he also looks for payment of his debt. But he who seeks equity must do equity, and the amount bid by the complainant (a minor at the time), one hundred and five dollars, with six per cent interest thereon from the day of sale, should be required to be refunded as a condition of annulling the sale.

For refusing to allow this, the decree must be reversed and the cause remanded for proceedings in accordance with this opinion.

TRUSTEE'S SALE—NECESSITY OF NOTICE.—If the discretion of a trustee has not been limited by the instrument creating the trust, he is not bound to give any notice of his intention to sell, but may dispose of the property at private sale, and without notice, as though he were selling his own property: Monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 287, discussing the entire question. If a trustee sell without giving public notice, when he is directed to give such notice, the sale is valid as to a purchaser, the trustee being held responsible for a deficiency, if any: *Minuse v. Cox*, 5 Johns. Ch. 441, 9 Am. Dec. 313.

TRUSTEE'S SALE—NOTICE—INSUFFICIENCY.—A trustee's sale under a power contained in a trust deed should be made with precision to render it valid. The notice of sale should contain such facts as would reasonably apprise the public of the place, time, and terms of sale, and the property to be sold. But mere omissions and inaccuracies in these respects, not calculated to mislead, and working no prejudice, will not be regarded: *Powers v. Kueckhoff*, 41 Mo. 425, 97 Am. Dec. 281; see the monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 286-289.

WALTON v. WALTON.

[76 MISSISSIPPI, 662.]

HOMESTEADS—CONVEYANCE BY WIFE—TEMPORARY ABSENCE OF HUSBAND.—A husband is living with his wife, within the meaning of a statute preventing her from alone conveying her homestead when he is living with her, unless he has ceased to live with her with intent never to return. The fact that he absents himself from wife and home in an effort to better provide for the family, with intent to return as soon as circumstances will permit, does not constitute an abandonment of the wife, nor does he cease to live with her under such circumstances.

HOMESTEADS—HUSBAND AND WIFE—CONVEYANCE BY WIFE—ABSENCE OF HUSBAND.—A husband does not cease to live with his wife within the meaning of a statute prohibiting the wife alone from conveying her homestead if her husband is living with her, although he absents himself from wife and home in an effort to better provide for the family and his intent to return is subject to the purpose of having his wife join him if it should transpire that they can better their condition by removing from the homestead and securing another in another place.

HUSBAND AND WIFE—HUSBAND, WHEN LIVING WITH WIFE, THOUGH ABSENT.—In legal contemplation, the husband is living with the wife, though driven by stress of circumstances and pecuniary difficulties to absent himself from home and wife in an effort to better provide for his family, and he ceases to live with his wife only when, with intention to never return, he deserts or abandons her.

Clifton & Eckford, for the appellant.

Houston & Reynolds, for the appellee.

664 **WOODS, C. J.** Section 1985 of the code of 1892 is in these words: "A conveyance, mortgage, deed of trust, or other encumbrance of the homestead, where it is the property of the wife, shall not be valid or binding unless signed and acknowledged by the owner and the husband, if he be living with his wife."

The only question necessary to be considered by us is, Was the appellant living with his wife at the time of the conveyance of the lands in controversy by the wife, Mrs. Walton, Sr., to the appellee? The evidence shows that in January, 1893, the appellant, being unable to properly support his family, went to Florida to seek employment, with a view to supplementing the insufficient revenues derived from the little farm constituting the homestead, and he thus went with full consent of his wife and the children who had reached years of discretion. **665** It seems clear to us that the appellant, in thus leaving his family, was not deserting or abandoning his wife and chil-

dren, nor with a settled determination never to return. The very statement contained in appellant's deposition, to the effect that if he could better his condition in Florida, and could there get a home and do better (than in Mississippi), his wife was to go to him, and upon which counsel for appellee dwell with emphasis in their argument on this branch of the case, demonstrates that there was no desertion or abandonment on the part of the husband of his wife and family, but only an intention, in certain contingencies remote and problematical in the extreme, and which, in fact, never had a prospect of realization, to remove his family to Florida. The necessary implication from this statement, contained in appellant's deposition, is that he intended to return to Mississippi unless two events could be brought about, viz., that he could better his condition in Florida, and could secure a home there, and neither event ever transpired. Moreover, the appellant swears that he never intended to change his domicile, and that he uniformly refused to qualify himself for or perform any acts of citizenship in Florida, though requested by persons there to do so, because he regarded himself as a citizen of Mississippi.

When the conveyance of the homestead was made, in a little less than eighteen months after the departure of the husband from this state for Florida, and during this period, the transcript before us fails to disclose that the absent husband, or the wife and children at home, had any thought of an abandonment and desertion of the family by the husband.

It is true that the appellant did not return to his family and home until the year 1896, but his protracted absence is perfectly explained by him in his evidence, and there is not a scintilla of proof elsewhere in the record which casts suspicion on his explanation.

On two former occasions the appellant had gone to California and the Indian Territory on the same quest which carried him ⁶⁰⁰ later to Florida. On one of these occasions he was absent from home and family for a year. Was there abandonment and desertion then? There is no one who hints a suspicion of that sort. His efforts in California were successful, and he is shown to have fairly divided his earnings while in that state with his family. For the two or three months following his arrival in Florida, and when he had steady employment at fair wages, he sent about half his earnings to his family. Afterward, and when with fitful or no employment, he was able to send only pitiful little sums to his children, and the sending of these piti-

ful sums now and then left the unhappy father without a cent for his own use. Is abandonment and desertion of one's family to be scouted where success crowns the absent husband's labors, but to be assumed where misfortune and disappointment mock his efforts and blast his hopes?

In legal contemplation the husband is living with his wife, though driven by stress of pecuniary difficulties to absent himself from wife and home in an effort to better provide for his family, and ceases to live with the wife only when, with intention never to return, he deserts or abandons her. The agent of his country, in diplomatic service in foreign lands, the merchant, in the prosecution of his business and to better his fortune, on the islands of the sea, and the traveler for pleasure or in the interest of science in the polar regions, are each and all living with their wives and in their homes, in the meaning of our statute.

The decree should have been for appellant, but any sum that may be found to be due appellee on an accounting between the parties, for money advanced by appellee to release the land from the Johnson deed in trust, as well as for money advanced by appellee in payment of taxes due on the lands, should be held to be a charge on the lands. Of course, on such an accounting, the appellee should be charged with any rents and profits derived from the lands, and with the proceeds of any personal property belonging to appellant which the appellee may be shown to have disposed of or converted to his own use.

Reversed and remanded.

HOMESTEADS—ABANDONMENT—CONVEYANCE BY HUSBAND OR WIFE.—Abandonment of a homestead by a husband or wife does not validate a conveyance of the homestead by one of them without the other's signature: *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593.

HOMESTEADS—ABANDONMENT.—If the owner of a homestead removes therefrom with the intention and expectation of selling it, and making his home in another place, this must be deemed an abandonment of the homestead, although he intends to return to it if he fails to sell it: *Conway v. Nichols*, 106 Iowa, 358, 68 Am. St. Rep. 311, and note.

HOMESTEAD — ABANDONMENT. — DESERTION BY THE HUSBAND, leaving his family still occupying the homestead, is not an abandonment of the homestead: *Moore v. Dunning*, 29 Ill. 130, 81 Am. Dec. 301. A homestead is not abandoned by the owner's absence for six or seven months without any intent to change his residence, leaving his family and servants upon the premises: *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642.

HUSBAND AND WIFE.—WHAT CONSTITUTES DESERTION: *Williams v. Williams*, 130 N. Y. 193, 27 Am. St. Rep. 517.

YAZOO & MISSISSIPPI RAILROAD CO. v. MILLSAPS.

[76 MISSISSIPPI, 855.]

CARRIERS—NEGLIGENT DELAY—LOSS FROM UNFORESEEN CAUSE.—Although a carrier, by negligent delay in transportation, exposes goods to loss or injury by act of God, or other cause for which he is not responsible and could not naturally foresee, he is not liable.

CARRIERS—NEGLIGENT DELAY—LOSS BY FIRE—PROXIMATE AND REMOTE CAUSE.—If a carrier negligently delays the transportation of goods, and they are destroyed by an accidental fire not originating on the carrier's premises and for which he is not responsible, he is not liable, as the fire is the proximate cause of loss, while the delay is only the remote cause.

Mayes & Harris, for the appellant.

Martin & Anderson, for the appellee.

⁸⁵⁷ WHITFIELD, J. Going directly to the heart of the matter, the inquiry, on the answer to which this case must turn, is, Was the fire in this particular case the intervening, independent, proximate cause of the loss, accidental and nonnegligent as to the appellant's employés? Grant, as we think is shown, that the delay in transportation was negligent, was there any causal connection between such delay as the proximate cause and the loss? Or was the loss due wholly to a fire purely accidental, as to which fire, in its origin and progress, the appellant was wholly free from blame, the fire being the independent, intervening, proximate cause of the loss?

As to this it is said in Shearman and Redfield on the Law of Negligence, fifth edition, 1898, volume 1, section 40, under the head of "Superior force concurring with defendant's delay": "In the application of this principle, a serious difference of opinion has arisen as to what is a natural sequence of negligence exposing the property of another to injury. In Pennsylvania, Massachusetts, Ohio, Iowa, Nebraska, and Arkansas, as well as in the United States supreme court, it is held that, where a carrier, by negligent delay, exposes goods to injury by the act of God, or other cause for which he is not responsible, and which he could not naturally foresee, he is not liable for injuries arising from such a cause, although they would not have affected the goods if he had not negligently delayed their transportation. This decision is put upon the ground that he could not reasonably have anticipated such a result of his delay, and that, for aught he could possibly foresee, promptness might have exposed the goods to the risk quite as much as delay. In New ⁸⁵⁸ York, New

Hampshire, Missouri, and Tennessee, the very opposite doctrine is firmly settled": Citing the authorities on both sides. We observe, curiously enough, the failure of the learned authors to cite in support of the nonliability of the carrier in such case the masterly opinion of Cooper, C. J., in *Merchants' Wharfboat Assn. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76. We note that the cases cited for nonliability by the learned authors are those cited and relied on by the counsel for the appellant and the court in *Merchants' etc. Assn. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76. So that, in this state, the question is settled against the liability of the carrier in such case. One of the cases relied on by learned counsel for appellee—*Thomas v. Lancaster Mills*, 71 Fed. Rep. 481—is a striking illustration of this very doctrine: See page 484, where the court says, citing many authorities: "This delay [of seventeen days] was not of itself a proximate cause of the destruction of the cotton by fire. . . . The negligent delay was, standing alone, a remote, and not a proximate cause, remotely contributing to the injury as an occasion or condition": See note to *Morrison v. Davis*, 57 Am. Dec. 701. The appellant, so far as this record discloses, could not reasonably have anticipated loss from this fire originating half a mile from the depot platform. It may be that on another trial the appellee may be able to establish facts which would show that the appellant ought to have anticipated probable loss from such fire, and hence was negligent as to that. And whether it ought to have reasonably so anticipated such fire is, as held in 64 Miss. 678, a question of fact for the jury. But unless the case of appellee is most materially strengthened on that point, we feel it our duty to say that the first instruction asked by the defendant, and refused, corrections as to dates touching interest being made, should be given as the full measure of appellee's rights.

Reversed and remanded.

CARRIERS—NEGLIGENT DELAY—LOSS BY ACT OF GOD—PROXIMATE CAUSE.—Where the negligence of a carrier consists merely in a delay in the forwarding of goods, the larger number of authorities sustain the principle that the carrier cannot be held liable, if the goods thus delayed are destroyed by the act of God, though, but for the delay, they would have reached a place of safety, the ground assigned being that the delay becomes a remote cause of the loss, when a calamity which could not have been anticipated intervenes: Monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 839, where the authorities upon both sides of the question are collected. See, also, *Davis v. Central Vermont R. R. Co.*, 66 Vt. 290, 44 Am. St. Rep. 852.

CALDWELL v. WALKER.

[76 MISSISSIPPI, 879.]

FRAUDULENT CONVEYANCES—PURGING FRAUD.—A conveyance fraudulent as to creditors of the grantor when executed is not purged of the fraud, though the grantee remains in possession and pays debts of the grantor in excess of the value of the property.

FRAUDULENT CONVEYANCES—PURGING FRAUD.—A fraudulent conveyance may be abandoned and a new conveyance made in good faith before the rights of third persons have intervened, and the latter conveyance may be valid, but there can be no *ex post facto* purgation of fraud.

Action to set aside a deed executed by Dudley to Caldwell as fraudulent as to the grantor's creditors. Caldwell claimed that the deed was valid, on the ground that he had been in absolute possession of the property conveyed to him for a number of years, and that he had paid off bona fide debts of Dudley in excess of the value of the property, thus purging the conveyance of the fraud. Judgment against Caldwell and others, and they appealed.

Miller, Smith & Hirsh and C. Perkins, for the appellants.

Yerger & Percy, for the appellees.

889 WHITFIELD, J. If profound legal ability were all that was needed to save an utterly bad cause, the appellant might entertain hope; but the facts in this record are beyond legal medicament, and bring the case squarely within the condemnation of *McLean v. Letchford*, 60 Miss. 169, and *May v. Taylor*, 62 Miss. 500, as appellant was duly advised at the outset by learned counsel.

It is said that there has been here an *ex post facto* purgation of the actual fraud tainting the original conveyance, and *Oriental Bank v. Haskins*, 3 Met. 332, 37 Am. Dec. 140, and *Hutchins v. Sprague*, 4 N. H. 469, 17 Am. Dec. 439, and *Thomas v. Goodwin*, 12 Mass. 140, are mainly relied on to support the view. In the first case there was a "new agreement," by reason of which the original paper stipulating for a reconveyance had become unimportant, and the whole discussion shows that it was the validity of the new agreement which protected the party. *Hutchins v. Sprague*, 4 N. H. 469, 17 Am. Dec. 439, is severely criticised in a later case in New Hampshire: *Boardman v. Cushing*, 12 N. H. 105; *Albee v. Webster*, 16 N. H. 362, 370. *Hutchins v. Sprague*, 4 N. H. 469, 17 Am. Dec. 439, and *Thomas v. Goodwin*,

12 Mass. 140, are both said by Chief Justice Parker to hold merely that: "A sale may be fraudulent as to creditors on account of a secret trust accompanying it, but if, by a subsequent agreement, before the creditors interfere, the secret trust is discharged, and the sale is otherwise valid, the fact that the trust once existed will not operate longer to vitiate the sale, the fraud being purged." And Mr. Bigelow says (2 Bigelow on Fraud, 408) that, where, "after the conveyance has been made, and before any steps have been taken against it by the creditor, a reconveyance is made, this is proper, and there is nothing then for the statute to operate upon"; and, concluding a review of the authorities, he says: "On the ⁸⁹⁰ whole it is difficult to sustain the doctrine of purging fraud in its ordinary manifestation, and it is better to leave the parties to the unlawful transaction in the meshes of their own net."

The true view is, that there is not, properly speaking, any *ex post facto* purgation of fraud, a doctrine which would encourage fraud and put a premium upon its perpetration. Cases which are said to illustrate that doctrine are often misunderstood, and simply hold that, where a conveyance which is voidable for fraud has been abandoned, and, before the rights of third parties intervene, a new and independent conveyance is made in good faith, it will be upheld, not because of any supposed purging of the fraud from the old, but because of the good faith and legality of the new conveyance.

But, whatever the true doctrine, it has no possible application on the facts of this case. It is wholly inapplicable. We see no good to be subserved by setting out at large the facts.

Affirmed.

FRAUDULENT CONVEYANCES—PURGING FRAUD.—A conveyance fraudulent as against creditors or against subsequent purchasers is voidable only, not absolutely void, and may be purged of the fraud by matter *ex post facto*, whereby the fraudulent intent is abandoned, and the conveyance confirmed for a good and adequate consideration *bona fide*: *Oriental Bank v. Haskins*, 3 Met. 332, 37 Am. Dec. 140, and note; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348.

MILLSAPS v. CHAPMAN.

[76 MISSISSIPPI, 912.]

CORPORATIONS—LIABILITY OF DIRECTORS.—If a director in a corporation resigns, buys the corporate property shortly thereafter, and is then re-elected a director, he is liable as though he were a director when the property was purchased.

CORPORATIONS—LIABILITY OF DIRECTORS—RESIGNATION—RE-ELECTION.—If a director in a corporation is re-elected, serves his term, attends meeting, receiving pay therefor, then resigns, but accepts re-election three months thereafter, and permits himself to be advertised as a director during the entire time, he must be held liable as a director during the entire period, within the rule preventing a director in an insolvent corporation from purchasing its property and paying therefor in the stock of the corporation.

CORPORATIONS—INSOLVENCY—PURCHASE BY DIRECTOR.—At the option of an insolvent corporation, or of its creditors, a sale of the corporate property to a director may be set aside, and he may be treated as a trustee for the corporation.

CORPORATIONS—INSOLVENCY—PURCHASE BY DIRECTOR.—If a contract of purchase of corporate property is made between an insolvent corporation and its director, such contract may be wholly annulled, if actual fraud entered into it, and the director may be denied any reimbursement, and, if not corrupted by fraud, the court may vacate or uphold the purchase, and in either event may require the director to account for profits, or the difference between the price actually paid and the real value at the time of the purchase. The remedy must be molded to fit the circumstances of each case.

CORPORATIONS—INSOLVENCY—LOAN TO.—A loan made in good faith by a director and a third person to an insolvent corporation may be validly secured by a mortgage on the corporate property.

MORTGAGES—ATTORNEY'S FEE FOR COLLECTION.—A mortgage note may validly stipulate for the payment of an attorney's fee for its collection.

Brame & Alexander and Jayne & Watson, for the appellants.

Carroll & McKellar, for the appellees.

952 **WOODS, C. J.** The bill charges combination and confederation by the directors of the bank whereby and in pursuance of which they have wasted the assets of the bank, have used the deposits of creditors to pay obligations on which they were liable, and have violated their duty as directors, being trustees for creditors and depositors, all the while saving themselves harmless by thus using and appropriating the funds of the bank and those of depositors. In the nineteenth and twentieth paragraphs of the bill two specific objects are sought. In the nineteenth paragraph it is charged that the defendant, Millsaps, hav-

ing resigned as director for that purpose, bought from the sorely straitened and really insolvent bank, for about one-half its value, certain real estate belonging to the bank, to wit, the Harris-Andrews and Weesinger properties, and soon after such purchase was re-elected a director. It is charged that he paid for the properties seven thousand five hundred dollars in cash, and two thousand five hundred dollars in stock of the bank, then worthless, and that the properties were of the actual value of ten thousand dollars to twelve thousand dollars. The prayer of the bill is to set aside the sale, divest the title out of Millsaps, and re-vest it in the bank. If mistaken in this, the complainants seek a decree against Millsaps for the difference between the seven thousand five hundred dollars cash paid by him and the actual value of the properties ⁹⁵³ at the time of the sale, inasmuch as the bank could not legally accept for property owned by it stock held by a director, and especially where the stock was worthless.

Was Millsaps a director at the time of the purchase? He was first elected a director in the year 1891, and he formally accepted. He was re-elected as a director in 1892, and was re-elected in the years 1893 and 1894. In his answer he states that he was not informed of his re-election in the years 1893 and 1894, and that he promptly resigned in February, 1894, on ascertaining the fact of his re-election for the year 1894. But it is shown that his name was continuously published to the public as a director in a newspaper issued in the town where the bank was located. It appears, moreover, that he presented to the bank his account for expenses incurred in attending the meeting held in February, 1894, and received the amount of the account as a director, as we must assume. There is nothing to indicate that stockholders had been paid by the bank their expenses incurred in attending a stockholders' meeting at which they were looking after their own interests only. It is significant, too, that, after his formal resignation in February, he purchased this property in April of the same year, and in May, the month following his purchase, he was again elected a director and formally accepted. He must, therefore, under these circumstances, be treated as a director and held to liability as one.

That the bank was in the year 1895, and had long been prior thereto, insolvent seems not open to controversy.

While the rule requiring directors of a bank, because of their fiduciary character, to act with the utmost good faith, and forbidding them to deal in the funds or property of the bank for their own personal advantage, is of universal recognition, we are

of opinion that, substantially, the rule had proper enforcement in the court below. At the option of the bank, or its depositors and creditors, the sale of its corporate property to a director may be set aside, the purchasing director being ⁹⁵⁴ treated as a trustee of the property for the bank. The contract of purchase may be wholly annulled, if actual fraud entered into it, and the fraudulent and faithless director denied any reimbursement. If not corrupted by fraud in fact, the court may vacate the purchase, because made in violation of law, or may uphold it, and, in either case, where only constructive fraud is shown, require the fiduciary to account for profits, or the difference between the price actually paid and the real value of the property at the time of the purchase. The remedy will be molded to meet the circumstances of each particular case.

In this case the respondent, Millsaps, appears to have been not anxious to make this purchase, as his letters to his codirectors show. They show also, we think, that he made the purchase without any willfully fraudulent purpose. But these letters likewise abundantly show that he believed, and had strong ground for believing, that the transaction could not legally be made, at least to the extent of using stock as part payment of the purchase price. He was so advised by his counsel. But he yielded to the solicitations of others, and while saying he "would ne'er consent, consented," just as other mortals have done, and will continue to do. The court below did not think Millsaps should be treated as a trustee *ex maleficio*, and denied reimbursement to the extent of the seven thousand five hundred dollars in cash actually paid by him, but that the purchase was fraudulent in law only, and that the purchaser, while entitled to be protected in his title, should be required to pay to complainants the profits derived by him from his purchase—that is to say, the difference between seven thousand five hundred dollars, which he paid in money, and the actual value of the property at the date of his purchase. This difference was found by the master, who took and stated an account to be about four thousand six hundred dollars, including interest. The evidence as to the value of the property was conflicting. The court below confirmed the master's report, and we are not disposed to disturb that action. On the cross-appeal from the ⁹⁵⁵ decree of foreclosure on the cross-bill of Millsaps and Tribbette, we see no error in the decree of the court. This was a loan, pure and simple, made by Tribbette, who was never a director, and Millsaps, of eight thousand dollars, on two years' time, and, we entertain

no doubt, entitled the mortgagees to foreclosure for the satisfaction of their debt. The item of attorney's fees allowed Millsaps and Tribbette was strictly in accordance with the terms of the contract made between them and the bank. The mortgage, it is true, provided only for a reasonable attorney's fee, if the property should be sold by the trustee named in it, but the note, whose payment was secured by the mortgage, stipulated for a fixed attorney's fee if the note had to be placed in the hands of an attorney for collection, and by foreclosure decree as prayed in the cross-bill of Millsaps and Tribbette, the attorney's fees were a proper charge against the mortgagor.

Affirmed on direct and cross-appeal.

CORPORATIONS—LIABILITY OF DIRECTORS—PURCHASING CORPORATE PROPERTY.—The directors of a corporation are trustees for the corporation, and within the rule that one holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use, or for his own benefit, and, if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, though such fiduciary may have paid full price and gained no advantage: *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88.

CORPORATIONS—DIRECTORS DEALING WITH.—A director of a solvent corporation is a trustee and agent of it and of its stockholders only and so far as its creditors are concerned. He may deal with it, loan it money, and take security therefor, in like manner as a stranger. In such case, the subsequent insolvency of the corporation will not affect such officer's right to recover his loan or enforce his security: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401; *Schufeldt v. Smith*, 131 Mo. 280, 52 Am. St. Rep. 628, and note.

CORPORATIONS.—DIRECTORS OF AN INSOLVENT CORPORATION cannot secure to themselves a preference: *Hill v. Pioneer Lumber Co.*, 113 N. C. 173, 37 Am. St. Rep. 621; *Corey v. Wadsworth*, 99 Ala. 68, 42 Am. St. Rep. 29.

CORPORATIONS—INSOLVENCY—PURCHASE BY DIRECTOR.—The assets of an insolvent corporation are regarded as a trust fund for the payment of all its creditors; the directors occupy the position of trustees of such fund, and may be prohibited from purchasing the trust property, and thus securing a preference over other creditors: *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, and monographic note thereto, especially on page 301, where this question is discussed.

ATTORNEY'S FEE STIPULATED FOR IN MORTGAGE.—In Michigan, an agreement for an attorney's fee in an instrument is void unless expressly sanctioned by statute, and a court of equity has no inherent power to enforce such an agreement: *Kittermaster v. Brossard*, 105 Mich. 219, 55 Am. St. Rep. 437. The great weight of authority, however, supports the rule laid down in the principal case: See the monographic note to *Kittermaster v. Brossard*, 55 Am. St. Rep. 438.

PRATT v. HARGREAVES.

[76 MISSISSIPPI, 955.]

WILLS—RECOGNITION OF BEFORE PROBATE.—A court of equity cannot recognize, nor act upon, a will until it has been admitted to probate.

WILLS AS EVIDENCE.—To entitle a person to offer in evidence a will under which he claims title, he must first show that it has been regularly admitted to probate, in any proceeding other than one to establish the will.

J. I. Ford and F. Johnson, for the appellants.

T. V. Noland and T. M. Miller, for the appellees.

⁹⁵⁵ **WOODS, C. J.** The demurrer to the bill of appellants was properly sustained. Until the will under which appellants claim has been probated, the devisee could not introduce it in evidence to show title. It is true that when probated the will must relate back to the death of the testatrix, but until probated the devisees have no standing in court authorizing them to enjoin the prosecution of suits at law by the heirs-at-law. The title to the property is cast upon them by law, and there it will remain until probate of the will, when first the devisees will have the only evidence admissible to show their title. Mr. Pomeroy, in his work on Equity Jurisprudence, volume 3, section 1158, says: "The doctrine seems to be general, if not universal, throughout the states that a court of equity will not recognize nor act upon a will of land or of personalty until it has been admitted to probate." The author shows why the contrary doctrine formerly prevailed in England, and why it no longer prevails there. And in Schouler's Executors and Administrators, section 58, this language is used: "In general the necessity for a probate is fully sustained by modern practice in England and in this country, . . . and neither the temporal courts in England, nor the courts of law and equity in the United States, will take cognizance of the testamentary papers, or of the rights dependent on them, until after their proper probate." In our own state it has been held that a foreign executor cannot maintain an action of ejectment to recover land in this state without first taking out letters testamentary here, and that though the will had been probated here: *Sims v. Hodges*, 65 Miss. 211. And in *Fotherree* ⁹⁶⁹ v. Lawrence, 30 Miss. 416, this court said: "In order to entitle a party to offer in evidence a will under which he claims title, it is incumbent on him to show that it has been regularly admitted to probate."

The appellant could not have defended the two actions at law, whose prosecution he enjoined, because he could not have offered in evidence the will under which alone he claims title, nor can they maintain their injunction against the prosecution of these suits, for the same reason, viz., until the will shall have been properly probated they have no evidence of title which will give them standing in a court of equity. Plainly, as a bill purely for the probate of the will of Mrs. Bidwell, nothing is shown by which any necessity exists for a second proceeding in the same court to effect the same end.

The issue *devisavit vel non* on the petition presented in the former proceedings for probate of this will yet remains in the court and should be proceeded with. That proceeding was the proper one for testing the validity of the will, and appellees should not be harassed by a second and unnecessary suit.

Affirmed.

WILLS AS EVIDENCE, BEFORE PROBATE.—Before probate, a will is not admissible as evidence of title to land, nor can one claiming under it prove that it was fraudulently destroyed, and give secondary evidence of its contents: *Shumway v. Holbrook*, 1 Pick. 114, 11 Am. Dec. 153; *Olney v. Angell*, 5 R. I. 198, 73 Am. Dec. 62. Wills of land in Maryland must be admitted to probate in the courts of Maryland, and an exemplified copy of such a will, admitted to probate in the courts of another state, and devising lands in Maryland, is not evidence of title in the devisee here: *Budd v. Brooke*, 3 Gill, 108, 43 Am. Dec. 321.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE v. GRUGIN.

[147 MISSOURI, 39.]

HOMICIDE—THEORY OF DEFENSE—INSTRUCTIONS EMBODYING.—Where the story of the defendant in homicide is not unreasonable nor stamped with improbability, although in some respects his testimony is not consistent, he is entitled to have the theory which it embodies presented to the jury with appropriate instructions.

HOMICIDE—PROVOCATION REDUCING TO MANSLAUGHTER—DEFINITION.—Adequate provocation, for such a state of mind as will reduce homicide committed under its influence to manslaughter, must be anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them.

HOMICIDE—SUFFICIENCY OF PROVOCATION—QUESTION FOR JURY.—Where a defendant in homicide pleads in mitigation of his offense that it was provoked by his knowledge that his daughter had been ravished by his victim, he is entitled to have submitted to the jury the question whether or not, under the evidence given, the provocation was sufficient to reduce defendant's crime to manslaughter.

HOMICIDE—INSTRUCTIONS AS TO PROVOCATION.—In a prosecution for homicide, which defendant pleads was committed under great provocation, it is error for the court to dictate to the jury, as a matter of law, what was a sufficient or reasonable provocation and what a sufficient cooling time.

HOMICIDE.—INSTRUCTIONS COMMENTING UPON THE EVIDENCE of provocation influencing the defendant to commit the offense are erroneous and justify a reversal, where plainly prejudicial to defendant.

HOMICIDE—IRRECONCILABLE INSTRUCTIONS.—An instruction in a prosecution for homicide that under the law mere excitement and agitation do not, of themselves and alone, destroy the element of deliberation in murder in the first degree, is erroneous and is moreover not reconcilable with a preceding instruction

allowing the jury to take such influences into consideration in passing upon the defendant's motives, intentions, and purposes, and the reasonableness and good faith of the same. Such instructions are well calculated to mislead the jury and, therefore, justify a reversal in favor of the defendant.

HOMICIDE—INSTRUCTIONS—BRUTALITY AND ATROCITY.—Homicide done by means of a shotgun at close range is not necessarily brutal and atrocious, and the court is not justified in using the terms "brutality and atrocity" in instructing the jury.

HOMICIDE—PROVOCATION ARISING FROM WORDS.—In exception to the general rule, there are circumstances where mere words do amount to a provocation in law, that is, a reasonable provocation, to be submitted to the determination of the jury, and, if found by them to exist, may reduce homicide to the grade of manslaughter.

HOMICIDE—FELONY OF DECEASED—RIGHT OF DEFENDANT TO ARREST HIM.—One who has sexual intercourse with a female of previous chastity and under eighteen years of age, whether with or without her consent, is, in Missouri, guilty of felony, and the father of such female, having knowledge that such felony has been committed, has the right to go to the home of the guilty man to arrest him. His right to be there for that purpose is not destroyed by the fact that, under provocation by words of such person, and in hot blood, he killed him, and the court should, in a prosecution of the parent for homicide and upon his request, so instruct the jury.

Guthrie, Dysart & Mitchell and Ben Franklin, for the appellant.

E. C. Crow, attorney general, S. B. Jeffries, assistant attorney general, and W. W. Graves, for the state.

42 SHERWOOD, J. The appeal in this instance is taken by defendant from the judgment of the trial court, which, based on the verdict of the jury, adjudged and sentenced **43** him to the penitentiary for the term of fifteen years as punishment for the crime of murder in the second degree.

The indictment was for murder in the first degree. There had been a mistrial, at the end of which defendant was admitted to bail in the sum of five thousand dollars.

Briefly told, the substance and general outline of the evidence is this: Jeff Hadley, who was killed on the 6th of May, 1896, had about a year prior to that date, induced Louella, one of the daughters of defendant, to run away with him and get married. This was done after defendant, not liking the bad habits Hadley had, forbade him to visit his house. These circumstances naturally produced bad blood between the parties, and gave rise to reciprocal threats being made by them; defendant, on the occasion of the daughter being carried away by Hadley and married, remarking: "It looks like I ought to take my gun and go

kill him," or words to that effect. On his part, Hadley was not backward in making threats respecting his recalcitrant father-in-law, by exhibiting a knife and revolver and inquiring how they would do for "Old Seal?" et cetera. These threats of Hadley's had been told to defendant.

Time went on, however, and occasionally Louella would visit her old home, and on perhaps two occasions her husband accompanied her, and on one occasion, she visited the house of her father, the Sunday before the homicide, which occurred on Wednesday, and took dinner there.

Defendant had also visited his daughter, perhaps once or twice, and taken a meal or two with her, her husband being present. The families lived something over two miles apart, and both were by no means in affluent circumstances. Defendant owned, and lived on, a little place of his own, and Hadley had rented a forty of his wife's brother-in-law, who lived also on the same place and about a quarter of a mile distant. Defendant was about fifty years old, had been twice married, and of the first marriage there had resulted ⁴⁴ several children, all of them daughters and married except two, Caroline and Alma, who lived at home, and a son, who was about grown and also unmarried, remained with his father, assisting in working the little farm.

Alma was sixteen years old in April, 1896. On the afternoon of the 8th or 9th of that month she went to the house of her brother-in-law Hadley and remained with him and her sister over night. It is alleged that during the night he ravished her. On her return home the next day she had evidently been weeping, and her sister Caroline, with whom she slept, frequently would be awakened nights by her sister's crying, and finding her weeping would ask what was the matter, when she, without reply and still weeping, would turn her face to the wall. This continued for several weeks. On the Sunday next before Wednesday, May 6, 1896, Alma, who was not permitted to meet George Stephens, her betrothed, at her father's, met him at R. S. Tate's, her mother's father, and there without grossness she imparted to him the secret of her said story. Receiving this information, Stephens conveyed it the same day to Dan Tate and John Tate, the uncles of Alma, and also to Ransford, her brother. By Wednesday morning following, the information of the matter had reached the ears of R. S. Tate, the grandfather, who came down to the field on his place where Stephens was at work, and there, at his request, Stephens told what he had heard to the grandfather, and to Web Morse, who was with the latter. Tate, the

grandfather, not being on good terms with the defendant, and thinking it best he should be informed of the matter in hand, asked Morse to go over to Grugin, who was something about three-quarters distant at work in his field, and tell him about it. Morse, accordingly, taking with him Ancil Milan, as Tate asked him, went and delivered the message of old man Tate. Morse, speaking of this message to Grugin, said: "I told Mr. Grugin that the report was that Jeff Hadley had ⁴⁵ ravished his girl about four weeks ago up at his house; that we didn't know whether he knew it or not, and that Mr. Tate wanted me to tell him." It was about nine o'clock in the morning when this message was delivered. Morse states that its delivery "seemed to hurt defendant dreadfully." "He wanted to know how I got it. I says: 'Your son knows it and my boy knows it,' and he said: 'My son? You fellows stay here and I will go and see my boy.' The boy was out of sight over the hill." When defendant reached the place where his son was plowing, and asked him about the truth of the report, his son replied: "Pa, it must be so." Receiving this answer, defendant, greatly agitated, told his son to "turn out: that our family is ruined." Proceeding with his story, Morse says: "He went over and directly he came back. Tears were running down his eyes, and he was terribly red in the face. He was crying. He says: 'Boys, it is so. Ransford says it is so and,' he says, 'I'll take my shotgun and go and kill him.' Then we tried to pacify him, but it didn't seem to do very much good. After he said he would kill him, we told him that he hadn't better do it; that the thing was not positive. I told him it was not proof—it was not proven that it was so yet. I says: 'How will you find out?' He says: 'I will go to the house and Caroline will tell me'" Leaving the field where Morse was between 10 and 11 o'clock, defendant went up to his house to see his daughter Caroline, and Morse returned to old man Tate and told him he had delivered his message. Defendant, on reaching his house about 11 o'clock, spoke to Caroline and requested her to ask Alma if the report about Hadley and herself was true, when she replied it was, and Alma, a few minutes afterward, reaffirmed the same thing to her father. Her father at that time was excited and crying, and, Caroline being prostrated with the excitement incident to such an occasion, her father was occupied the most of the time until noon in taking care of her.

⁴⁶ About that time Gordon came, and defendant, having an engagement, had to assist him in setting up a corn-planter, and

dinner had to be prepared for him. Not much dinner, it seems, was eaten by that stricken household.

When Milan left between 10 and 11 o'clock, in order to tell Tate that his message had been delivered, he promised to come by on his return home and see defendant. He did so, arriving sometime after the noon hour. On Milan's arrival he told defendant that as Hadley might get the news of the discovery of his crime, he might get away, and advised defendant that he had better go and get him and turn him over to the officers. Having no doubt now, as defendant states, of Hadley's guilt, and fearing he would escape as suggested by Milan, defendant says: "I thought I would go up there and see Mr. Hadley and take charge of him, until I could get an officer." With this end in view, defendant took his double-barrel shotgun and four shells loaded with ordinary shot, and started to the place where Hadley lived. He arrived there about 3 o'clock in the afternoon, saw Hadley at work in the field planting corn, spoke to his daughter Louella, as he crossed the fence, and approaching Hadley, and when within a few feet of him, said: "Jeff, whatever possessed you to rape Alma, my daughter?" Hadley replied, "I will do as I damn please about it!" Defendant says that, as Hadley made this insolent reply, "He pitched forward as though he was coming at me—coming to me. I had my gun on my shoulder at that time and when he made his spring forward I pulled my gun off my shoulder and shot him. I then started home; from where I was standing in my tracks here I would pass close up, probably three or four feet; I don't know exactly. As I passed him, I don't know the cause of it, but I shot him the second time, but why I made the second shot, I don't know; but I did it, and I walked straight toward home. I then met Jenson and his wife, and the woman hallooed at me and wanted to ⁴⁷ know why I had shot Jeff. I says: 'He has raped one of my daughters, but he will not rape another one.' Then I walked straight on down the road."

This history of the tragedy is as succinct a statement as I could make of the facts embodied in this voluminous record. Of course, I have not deemed it necessary to recount the various items of testimony touching what defendant is alleged to have said both before he took up his shotgun and started on his errand and after he had surrendered himself and was lodged in jail, tending to show that his purpose was other than that he testified to as above stated. His story not being an unreasonable one, not stamped with improbability, he was entitled to have the

theory which it embodied presented to the jury by appropriate instructions, and, speaking about instructions, the court, at the request of the state, gave twenty, covering almost six pages of closely printed matter. At the request of defendant, the court gave nine instructions, modifying two of them. Defendant then asked another instruction which the court gave with a modification; thereupon defendant asked the court to modify that modification. This being refused, defendant asked the court to give seventeen other instructions, covering six more closely printed pages. Judging by this record, and the immense acreage of the instructions asked, given, modified, and refused, the trial judge must have had his patience sorely tried. I do not intend to encumber our reports with them, lest by so doing, I encourage and foster an imitation of their vastness and "damnable iteration." In discussing them I shall only refer to such as especially require comment. And, in passing, it is well enough to say that the instructions which begin the long series given on request of the state are in usual and appropriate form, and correctly, in connection with others, lay down the definition of murder in the first and second degrees. Omitting any discussion of the instructions at the present, the subject will ⁴⁸ be recurred to hereafter. The salient topics which this record presents and on which our attention will be centered, are these: 1. Did the outrage perpetrated by Hadley on his young sister-in-law Alma, defendant's daughter, authorize and require a submission to the jury of the question whether defendant's shooting Hadley was done in "hot blood" and therefore only manslaughter? 2. Did the insolent and defiant reply of Hadley, when questioned by defendant as to the vile deed he has done to the latter's daughter, authorize and require a submission to the jury of the question whether the words used by Hadley were such as to generate a sufficient or reasonable provocation so as to produce hot blood, and thus lower the grade of the homicide in either degree to manslaughter? 3. Whether certain instructions given at the instance of the state should have been refused? 4. Whether a certain instruction asked by defendant should have been given either as asked or in a modified form?

1. In discussing the first question propounded, we are necessarily brought into contact with that line of cases which treat of "hot blood" and how it may be engendered. Among other familiar instances furnished by the books, are those where a husband finds a man in the act of adultery with his wife and immediately kills him or her; that is accounted but manslaughter,

and it is the lowest degree of that offense; and, therefore, in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation: *T. Raym.* 212.

According to the old books, such discovery of the wife's adultery must have been made in the very act, and the killing must have been done "directly on the spot" in order to reduce the homicide to manslaughter: 4 *Blackstone's Commentaries*, 191; 3 *Greenleaf on Evidence*, 14th ed., sec. 122. The husband must have ⁴⁹ "ocular inspection of the act and only then": *Pearson's case*, 2 *Lew.* 216; 1 *Hale P. C.* 487.

But, since the law, as other sciences, makes progress, it is no longer accounted necessary that a husband should have "ocular inspection," et cetera. It suffices if the provocation be so recent and so strong that the husband could not be considered at the time master of his own understanding: *State v. Holme*, 54 *Mo.* 153. In the case just cited, the case of *Maher v. People*, 10 *Mich.* 212, 81 *Am. Dec.* 781, was approved, the facts in that case having been these: "The prisoner offered evidence tending to show the commission of adultery by H. with the prisoner's wife. Within half an hour before the assault, the proof showed that the prisoner saw them going into the woods together under circumstances calculated strongly to impress upon his mind the belief of an adulterous purpose; that he followed after them to the woods; that they were seen not long after coming from the woods, and that the prisoner followed on in hot pursuit, and was informed on the way that they had committed adultery the day before; that he followed H. into a saloon in a state of excitement, and there committed the assault. The court held that the evidence was proper, as from it it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which would have given to the homicide, had death ensued, the character of manslaughter only. The evidence showed that the prisoner, in following H. from the woods, was laboring under great excitement, that when a friend told him on the way what had happened the day before, his passion was increased, and that, when he arrived at the saloon, the perspiration had broken out all over his face." And in that case it was ruled that the question as to what is an adequate or reasonable provocation is one of fact for the jury, and so also is the question whether a ⁵⁰

reasonable time had elapsed for the passion to cool, and reason to resume its control.

And in Maher's case it is said: "To the question, what shall be considered in law a reasonable or adequate provocation for such a state of mind, so as to give to a homicide, committed under its influence, the character of manslaughter, on principle, the answer, as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them. . . . It is doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar fact of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused and reason obscured to render the homicide manslaughter, should inform them that the provocation must be one the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter. . . . The law cannot justly assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances; and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents. The same principles ⁵¹ which govern as to the extent to which the passions must be excited and reason disturbed apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or, in other words, to the question of cooling time. . . . The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or daughter, or the discovery of an adulterous intercourse with a wife; and

no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid down by the court, as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown at all in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and cannot without gross injustice, define the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the facts being found by the jury, is one of law for the court; but in all other cases it is a question of fact for the jury; and the court cannot take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury": See, also, *Rex v. Lynch*, 5 Car. & P. 324; *Rex v. Hayward* 6 Car. & P. 157; *State v. Norris*, 1 Hayw. 429, 1 Am. Dec. 465; *Starkie on Evidence*, ed. 1860, *768, *769.

In *Cheek v. State*, 35 Ind. 492, it was ruled on a trial for murder it is error to exclude evidence tending to show that the person killed by the defendant had entered into a ⁵² combination with a third person to induce the defendant's wife to elope with such third person and leave her husband and children, and that the facts tending to prove such combination, of late date, had come to the knowledge of the defendant. The court remarking: "There was some evidence given, and much more offered, but rejected by the court, tending to prove that the deceased, who was the father of the defendant's wife, was and had been in an unnatural combination with one Clem, to induce the defendant's wife to leave him and elope with Clem. This evidence, so far as the acts, sayings, and doings of Harrison, of a late date had been communicated or come to the knowledge of the defendant should have been admitted. This evidence would have tended to show the state of Cheek's mind, and a reason for his being so highly frenzied upon his meeting the deceased, as testified to by Dr. Kyle."

Commenting on the subject of the "adequacy of the cause of excitement," Bishop remarks: "The Doctrine.—Under this head, appearing as it does in the books in illustrations rather

than in rules, hardly admits of reduction to rule. Not attempting an impossible exactness, we may deem it in a general way to be that the law accepts human nature as God has made it, or as it manifests itself in the ordinary man, and every sort of conduct in others which commonly does in fact so excite the passions of the mass of men as practically to enthral their reason, the law holds to be adequate cause": 2 Bishop's New Criminal Law, sec. 701.

Touching the subject of cooling time, Wharton observes: "Of course, hot blood could continue to exist, even after a day's delay, but this, which would sustain a conviction of manslaughter, is very different from a defense of excusable homicide, ending in an acquittal": 1 Wharton's Criminal Law, 10th ed., sec. 496.

Elsewhere, the same author, when discussing the point in hand, says: "Men's temperaments, also, vary greatly as ⁵³ to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal 'reasonable man,' but by that of the party to whom the malice is imputed. A man may be chargeable with negligence in not duly weighing circumstances which would have checked his passion, or which, when his passion was aroused, would have caused it more speedily to subside. But he is not chargeable with malice, when he was acting wildly and in hot blood. Hence, whether there has been cooling time, so as to impute to the defendant malice, is to be decided, not by an absolute rule but by the conditions of each case": 1 Wharton's Criminal Law, sec. 480.

In *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630, Parish had entered the bedchamber of Biggs, and insulted his wife by a personal indignity and by words. Biggs permitted Parish to escape with threats of punishment should he remain in the city. The next morning the would-be seducer appeared at the hotel breakfast table, and brazenly seated himself within two chairs of his intended victim, whereupon Biggs shot at, but unfortunately missed, him. Being indicted and tried for an assault with intent to murder, the trial court refused to admit evidence of what transpired in the bedchamber the night before, and this upon the theory that sufficient time had elapsed for passion to subside, and for reason to resume her sway. But this refusal was held error, Lumpkin, J., saying: "To shut out the scene which transpired in the bedchamber is to deprive

the jury of the power of appreciating the transport of passion kindled in the bosom of Biggs by the presence of Parish."

In this connection, it must not be forgotten what a high estimate the men of all nations have placed on the chastity of their women and on the inviolability of their persons. Some of the fiercest tumults and wars have had their origin in assaults made on the modesty or honor of women. Notwithstanding this, the law as yet has made no ⁵⁴ provision and provided no punishment, for many such instances; nay, more, a brother who detected a man in the act of adultery with his sister, and thereupon stabbed him to death, was, by the supreme court of Pennsylvania, adjudged guilty of murder: *Lynch v. Commonwealth*, 77 Pa. St. 205.

Lord Macaulay, in his "Report on the Indian Code," very forcibly points out the gross injustice of accounting a husband who slays an adulterer, found with his wife, only guilty of manslaughter, and yet holds a high-spirited brother who, in a paroxysm of rage kills the seducer of his sister, guilty of murder. Proceeding further, Lord Macaulay says: "There is another class of provocations which Mr. Livingston does not allow to be adequate in law, but which have been, and, while human nature remains unaltered, will be, adequate in fact to produce the most tremendous effects. Suppose a person to take indecent liberties with a modest female, in the presence of her father, her brother, her husband, or her lover, such an assault might have no tendency to cause pain or danger; yet history tells us what effects have followed from such assaults. Such an assault produced the Sicilian Vespers. Such an assault called forth the memorable blow of Watt Tyler. It is difficult to conceive any class of cases in which the intemperance of anger ought to be treated with greater lenity. So far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter."

When testifying before the "Homicide Amendment Committee," in 1874, Blackburn, J., said: "Supposing a man is actually keeping company with a young woman; she cannot be called his sister or his ward, or even under his protection; and suppose a ruffian steps forward, and, in the presence of the other, pulls up her petticoats, and catches hold of her, and the other struck him down, and the man ⁵⁵ died. That case was before Mr. Justice Pattison, at York; somehow or other the jury and Mr.

Justice Pattison contrived to acquit him altogether. I think that was provocation that would reduce it to manslaughter."

If, as Bishop states, the "law accepts human nature as God has made it, or as it manifests itself in the ordinary man, and every sort of conduct in others which commonly does, in fact, so excite the passions of the mass of men as practically to enthrall their reason, the law holds to be adequate cause," I do not see how defendant is to be denied the benefit of that theory in the painful circumstances of the present case. To him, in contemplation of law, the foul wrong done his child, though not revealed to him until the morning of the day of the homicide, was as fresh and potent to stir his blood as if done on that very morning. If this be the case, then the law, while it softens the punishment of a husband who slays an adulterer found in his bed, surely cannot be so illogical as to deny a like result to a father who slays the ravisher of his young daughter. Indeed, it might well be said that in the latter case there should be greater lenity shown by the law than in the former, because the wife has been a consenting party to the homicide-producing adultery. The trial court, while it admitted the evidence which preceded the killing, yet, by its instructions, denied that such evidence had any effect to lower the grade of defendant's crime from either degree of murder to manslaughter. If the evidence referred to, was to be denied any effect, then it should not have been admitted. The instructions for the state under review were also erroneous, in that they dictated to the jury, as a matter of law, what was a sufficient or reasonable provocation, and what a sufficient cooling time. They were also guilty of the serious fault, prohibited by the statutes and condemned by numerous decisions of this court, that of commenting on the evidence, to wit, by stating to the jury that "if the jury find that such information was ⁵⁸ brought to Grugin on the forenoon of said day, and on the afternoon of said day, about 3 or 4 o'clock Grugin shot and killed Hadley because of this report, and his belief of it, to wit, that his daughter had been raped, then they will find defendant guilty of murder."

Again, the instruction is given, "that if they believe from the evidence that Grugin was informed that Hadley had ravished his daughter about one month before, and that information came to Grugin about 9 or 10 o'clock in the forenoon, and that in the afternoon Grugin went a distance of about three miles and shot and killed Hadley in his cornfield at work because of his (Grugin's) anger on account of said rape and

his belief that said rape had occurred, then the jury should find the defendant guilty of murder," et cetera. These comments on this point occur some four or five times. Such comments are sufficient of themselves to cause a reversal.

The tenth instruction given on behalf of the state told the jury "that, under the law, mere excitement or agitation do not, of themselves and alone, destroy the element of deliberation in murder in the first degree," et cetera, while the ninth instruction, given on defendant's request, told the jury "that, in passing upon the defendant's motives, intentions, and purposes, and the reasonableness and good faith of the same, they should take into consideration any agitation and excitement of mind and feelings, if any such were shown, as well as all other facts and circumstances shown in evidence." These two instructions cannot be reconciled, and were well calculated to mislead the jury, and, if the prior positions taken in his opinion are correct, then the tenth instruction aforesaid is not the law.

The fifth instruction is wrong, because there were no "indications of brutality and atrocity" in the commission of the homicide, unless it can be said that homicide done by ⁵⁷ means of a shotgun at close range, is necessarily brutal and atrocious.

2. The second interrogatory is next for consideration. It embodies and comprehends the question whether words constitute a sufficient or reasonable provocation in law. Of course, the books abound in utterance of the platitude that words, however opprobrious, constitute no provocation in law. Speaking as the organ of this court, I have often uttered this platitude myself, but the statement is subject to many qualifications. The general good sense of mankind has, in some instances, so far qualified the rigor of what is termed the ancient rule, that a statute has been passed in Texas which reduces a homicide to manslaughter where insulting words are used to or concerning a female relative; the killing is reduced to manslaughter where it occurs as soon as the parties meet after the knowledge of the insult: 9 Am. & Eng. Ency. of Law, 581.

In Alabama, a statute provides that opprobrious words shall, in some circumstances, justify an assault and battery: *Riddle v. State*, 49 Ala. 389. And in that state, without any statutory provision on the subject, it has been determined that "insult by mere words," when the defendant acts on them and he has not provoked them, may be weighed by the jury with other evidence, in determining whether the killing was murder in the first or second degree: *Watson v. State*, 82 Ala. 10.

After speaking of Morley's case, 1 Hale P. C. 456, Hale says: "Many who were of opinion that bare words of slighting, disdain, or contumely would not, of themselves, make such a provocation as to lessen the crime into manslaughter, yet were of this opinion, that if A gives indecent language to B, and B thereupon strikes A, but not mortally, and then A strikes B again, and then B kills A, that this is but manslaughter. For the second stroke made a new provocation, and so it was but a sudden falling out; and, though B gave the first stroke, ⁵⁹ and, after a blow received from A, B gives him a mortal stroke, this is but manslaughter, according to the proverb, the second blow makes the affray. And this was the opinion of myself and some others."

Now, in the case Hale supposes, it is, as he says, the second stroke that made a "new provocation," but the second stroke was given by A. Then what made the old provocation? Evidently, the "indecent words" of A which, given by A to B, prompted the latter to give the first stroke. So in Morley's case, it was agreed that "if, upon ill words, both of the parties suddenly fight, and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter": 6 Howell's State Trials, 771. In that instance, also, it must be noted that "ill words" were the provocation that made the hot blood which resulted only in manslaughter. To test this matter further, suppose no "ill words" used, what then the crime? Evidently, murder.

It is said in the books that, though an insufficient assault or demonstration do not import coming violence, still it and insulting words combined, may so excite the passions as to reduce the killing to manslaughter: 2 Bishop's New Criminal Law, sec. 704.

If the inchoate assault be naught as provocation, and the opprobrious words be naught as provocation, I am unable to see how the addition of these two ciphers can make a unit. "The moment, however, the person is touched with apparent insolence, then the provocation is one which, ordinarily speaking, reduces the offense to manslaughter": 1 Wharton's Criminal Law, 10th ed., sec. 456. And it is held that such "apparent insolence" may be manifested in a variety of ways, as, for instance, by a contemptuous jostling on the street, by tweaking the nose, by filliping on the forehead, or by spitting in the face. In most of these instances and illustrations there is no physical pain or injury inflicted, the "sudden ⁵⁹ heat" springs from the

indignity, the insult offered, and from nothing else: Kelly's Criminal Law, sec. 518. This being true, the law should not be so unreasonable as to deny to an insult offered in words the same force and effect which all men recognize that it has, as a matter of fact. If it "so excite the passions of the mass of men as to enthrall their reason, the law should hold it adequate cause" for the reduction of the grade of the offense, resulting from the use of the insulting words. No sound distinction can, it seems, be taken in principle between insult offered by acts and that offered by foul and opprobrious words.

I will now refer to some adjudications where insulting words have been held a sufficient basis for a charge or an instruction on the offense of manslaughter. Where the prisoner was indicted for the willful murder of his wife, Blackburn, J., in summing up, said: "As a general rule of law, no provocation of words will reduce the crime murder to that of manslaughter, but, under special circumstances, there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he, having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once, and I'll do it again.' Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did?": *Regina v. Rothwell*, 12 Cox C. C. 145. In that case (tried in 1871) the husband seized a pair of tongs, close at hand, and struck his wife three ⁶⁰ violent blows on the head, from which she died within a week, and the verdict was for manslaughter.

In *Regina v. Smith*, 4 Fost. & F. 1066, tried in 1866, a woman had left her husband and gone off and lived in adultery with one Langley. He having died, she returned to her home, and her husband forgave her, but she did not prize this forgiveness, because on the next night after her return she violently abused him, taunting him with her preference for Langley, and declaring that had he not died, she had not returned. Whilst this was going on, she was so violent as to have to be held by two other women who were present; her husband sat

by her on the seat, trying to pacify her. Finally, she broke from the women who were holding her and, repeating with much foul language, her preference for Langley, spat toward her husband, whereupon he, who was then standing up within a yard of her, gave her a blow in the neck with a sharp-pointed pocket knife, which caused her immediate death. And the jury were, in substance, charged: An assault, too slight in itself to be sufficient provocation to reduce murder to manslaughter, may become sufficient for that purpose, when coupled with words of great insult. A verdict of guilty of manslaughter was returned.

This case arose in Tennessee. The defendant killed Jones with a deadly weapon. Jones, being at defendant's house, used obscene language in the presence of defendant's family and at his table. Defendant being tried, he was convicted of murder in the second degree. The lower court held the words of the deceased, however obscene, and his conduct, however vexatious, could not amount in law to reasonable and adequate provocation, and, upon that view of the law, withdrew from the jury the consideration of the facts. Upon this, the supreme court held: "It ought to have been left to the jury to determine, under proper instructions, whether the obscene language of the deceased, used in the presence of the defendant's family, and at his table, in ⁶¹ connection with his vexatious conduct, was calculated to produce such excitement and passion, as would obscure the reason of an ordinary man, and induce him, under the excitement and passion so produced, to strike the blow, and whether, in fact, the blow was stricken in consequence of the heat of passion so produced. . . . Being greatly excited upon sufficient cause, he is impelled by a sudden motive of revenge, and that includes the idea of malice, whether he strikes with a deadly weapon or not. The fact that he used a deadly weapon, in connection with other circumstances, may be properly looked at, in determining whether the blow was the result of the sudden passion; but, when the jury are satisfied that the defendant was impelled by sudden passion, produced by sufficient provocation to strike, the simple fact of using a deadly weapon would not make the blow malicious": *Seals v. State*, 3 Baxt. 466.

In *Wilson v. People*, 4 Park. C. C. 619, the accused was convicted of murder in the first degree. The statutes in that state as to murder and manslaughter are the same as our own. The deceased had been struck on the head by a hatchet or some

other weapon, but died, it seems, in consequence of falling into the water and drowning. The lower court had charged that the "heat of passion" meant by the statutes, could not be produced or provoked by "words of the most aggravated character." Commenting on this charge, Wright, J., observed: "The law, respecting the infirmities of our nature, attaches a less degree of criminality to acts of violence perpetrated under an excitement provoked by the assailed. The passions may be heated as effectually by words as by acts; and an assault may be provoked oftentimes as readily by the former as the latter. In cases of assault of the person, it has always been held that provocation by words has gone far to mitigate the legal wrong. . . . It is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made,"⁶² and it matters not whether this state is produced by acts or words, if either the one or the other are naturally calculated to produce it."

So, it will be seen that there are circumstances where words do amount to a provocation in law, i. e., a reasonable provocation, to be submitted to the determination of the jury, and, if found by them to exist, then the crime is lowered to the grade of manslaughter. If there ever was a case to which this principle should be applied, it would seem it should be applied to the case at bar. A father is informed that his young daughter, just budding into womanhood, has been ravished by his son-in-law, while under the supposed protection of his roof. Arriving where the son-in-law is, and making inquiry of him why he has done the foul deed, that father receives the answer, "I'll do as I damn please about it." This insolent and defiant reply amounted to an affirmation of Hadley's guilt! So long as human nature remains as God made it, such audacious and atrocious avowals will be met as met by defendant. It should be held, therefore, that the words in question should have been left to the jury to say whether, in the circumstances detailed in evidence, they constituted a reasonable provocation, and, if so found, that then defendant was guilty of no higher offense than manslaughter in the fourth degree.

3. Relative to one of the instructions asked by defendant but refused by the court. This instruction was asked: "If the jury believe from the evidence that the deceased, Hadley, had intercourse with Alma Grugin in the year 1896, and that she was then unmarried, of previously chaste character, and under the age of eighteen years, then said Hadley was guilty of a

felony, and this is true, even though you may further find that she consented to such intercourse." This instruction lays down the law as announced by this court in *State v. Knock*, 142 Mo. 515. That Alma Grugin was of "previously chaste character" is shown by Hadley's ⁶³ remark to Alma, that "you are not the first; I've broke in lots of them." The instruction should have been given with the addition that if Hadley had done the deed mentioned, then defendant, having probable ground to fairly suspect him of being guilty, had the right to arrest him: *State v. Albright*, 144 Mo. 638. Such modifications or additions, to complete or rectify an improper instruction, are authorized by a long line of decisions of this court: *State v. Clark*, 147 Mo. 20. And, if defendant went in good faith to arrest Hadley, his right to be there for that purpose would not be destroyed because he shot Hadley in hot blood because of the reply Hadley gave him.

The judgment should be reversed and the cause remanded.

Burgess, J., concurs in toto.

Gantt, P. J., does not concur as to that portion of paragraph 2 in reference to words being regarded as a reasonable provocation by either court or jury.

HOMICIDE—PROVOCATION REDUCING TO MANSLAUGHTER.—To reduce a killing to manslaughter, it must be shown that the party doing it was justly provoked and transported by passion, ungovernable, and deaf to the voice of reason, and the cause which produces this frame of mind must be reasonable, and bear a just proportion to the effect: *Brooks v. Commonwealth*, 61 Pa. St. 352, 100 Am. Dec. 645; note to *Sullivan v. State*, 48 Am. St. Rep. 28. Sudden provocation, acted on in the heat of passion produced thereby, may reduce a homicide to manslaughter; but, if the provocation is not of such a character as would, in the mind of a reasonable man, stir resentment to violence endangering life, the killing is murder: *Holmes v. State*, 88 Ala. 26, 16 Am. St. Rep. 17; note to *Crawford v. State*, 35 Am. St. Rep. 250.

HOMICIDE—SUFFICIENCY OF PROVOCATION—QUESTION FOR JURY.—What is reasonable or adequate provocation for such a state of mind as should give to a homicide committed under its influence the character of manslaughter is a question of fact for the determination of the jury: *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630.

HOMICIDE—PROVOCATION—TIME TO COOL.—The question whether a reasonable time had elapsed for passion to cool and reason to resume its control is one of fact for the jury, depending upon all the circumstances of the particular case: *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

HOMICIDE—COMMENT OF COURT UPON THE EVIDENCE.—The judge should discharge his duty with impartiality, and it is

error for him to remark, on a trial for murder, that the deceased "had a right to be mad; he thought anybody shot had a right to be mad." The deceased had no right to be mad unless he had been wronged, and whether or not the defendants had wronged him, and if they had done so, to what extent, was the issue on trial by the jury, as to which they should receive no intimation from the judge of what he thought the verdict should be: *Horne v. State*, 37 Ga. 80. 92 Am. Dec. 49.

HOMICIDE—PROVOCATION BY WORDS.—Where the death of a human being is caused by the intentional use of a deadly weapon, provocation by words only cannot reduce the killing to manslaughter: *State v. Davis*, 50 S. C. 405, 62 Am. St. Rep. 837. In Texas, provocation by words only may reduce a killing to manslaughter: *Evers v. State*, 31 Tex. Crim. Rep. 318, 37 Am. St. Rep. 811.

BERTCHE v. EQUITABLE LOAN & INVESTMENT ASSOCIATION.

[147 MISSOURI, 313.]

BUILDING AND LOAN ASSOCIATIONS—MATURITY OF SHARES.—Shares in a building and loan association mature only when the periodical payments thereon, taken in connection with the other income of the association, bring their value up to par.

BUILDING AND LOAN ASSOCIATIONS—TRANSACTIONS WITH MEMBERS—NATURE OF.—The transaction between a building and loan association and a borrowing member is not a loan in the direct sense of the word, but only a prepayment or advancement to the shareholder of that to which he will ultimately be entitled, a sale by the borrower to the association of his prospective interest.

BUILDING AND LOAN ASSOCIATION—RIGHTS OF MEMBERS.—It is part of the fundamental law governing building and loan associations that all members must participate equally in the profits and bear the losses equally, and any contract by an association in contravention of this mutuality of interest and responsibility is ultra vires and void.

BUILDING AND LOAN ASSOCIATIONS—SHAREHOLDERS' NOTICE OF CHARTER AND BY-LAWS.—Borrowing members, as well as other members of a building and loan association, are deemed to have notice and are bound by its charter and by-laws unless the latter are illegal, and, where the by-laws of such an association provide that stockholders shall pay dues, interest, et cetera, until such time as their shares shall mature and their stock be worth its full par value, such provision is binding upon a borrowing stockholder, regardless of the terms of the special contract of loan entered into with the association by him, the terms of which would permit the maturity of his shares of stock before they had attained par value.

BUILDING AND LOAN ASSOCIATIONS—ULTRA VIRES CONTRACTS—MATURITY OF SHARES.—If the statutes governing a building and loan association fix no definite or arbitrary period at which the shares shall reach their par or maturity value, the association has no power to do so, and an attempt in notes and trust deeds to fix such period of maturity arbitrarily at one hundred months is ultra vires and of no effect.

Rodes, Boss & Bohling, for the appellants.

Barnett & Barnett, for the respondent.

348 ROBINSON, J. This is a proceeding in equity, brought in the Pettis county circuit court, by the plaintiff, as a stockholder, against the Equitable Loan & Investment Association of Sedalia, and the directors of said association, to enjoin the defendants from carrying out a resolution of the board of directors made in April, 1898, directing the release of certain deeds of trust given to the association by some twenty borrowing or advanced stockholders to secure the payment of loans or advancements on their shares.

There was a trial in the court below, resulting in a judgment enjoining and restraining defendants from carrying out said resolution and directing the annulment and rescission thereof. Defendants, having unsuccessfully moved for a new trial, bring the case here by appeal.

The petition alleged, in substance, that the association was organized under the Revised Statutes of 1879 relating to building and loan associations, and that plaintiff is the **349** owner of twenty-five shares of free and unredeemed stock of said association, of the par value of two hundred dollars per share, issued in April, 1894, upon which the dues have been regularly paid, and that she has not received any advancements thereon; that, under the statutes of Missouri governing associations of this character, the association loaned its accumulated funds to divers members thereof, upon the pledge of their several shares of stock; or, in other words, that the association redeemed the shares of such members in advance before they were fully paid up, by advancing to such borrowing members, who successfully bid in open meeting for the right of such priority or advancement, the full face value of their shares upon such borrowing members pledging their shares of stock to the association and executing their obligation in writing, whereby they agreed to pay the dues on their several shares of stock, and the interest and premium on the same so advanced, together with all fines and penalties, and thereupon, such borrowing members secured the payment of their obligations by executing to the association their deeds of trust upon unencumbered real estate owned by them.

Plaintiff further alleges that the board of directors have unlawfully and wrongfully, and in violation of the rights of plaintiff and other free shareholders, caused to be made and entered of record the following resolution, to wit:

"Whereas, certain members, shareholders of the Equitable Loan & Investment Association, have received loans or advancements upon their shares of stock in the sum of two hundred dollars each, and upon which, by the terms of their respective deeds of trust, they have paid the full amount of their dues, interest, and premiums, the same being for the full term of one hundred months from the date of their respective certificates of stock, as in their respective deeds of trust provided;

"And whereas each and all of said members, hereinafter mentioned, have fully complied with the requirements, ³⁵⁰ as set forth in their obligations and agreements made with this association, and have complied with the provisions of their deeds by payment of the amounts set forth therein, as due thereunder; and,

"Whereas, each and all of said members, after said compliance with the terms of the respective obligations, have formally demanded of this association a release of their respective deeds of trust, and cancellation of their stock, in satisfaction thereof, and have made tender of the proper funds for the release thereof.

"Therefore, be it ordered by the board of directors of said Equitable Loan & Investment Association that the president of said association be, and he is hereby, ordered forthwith to execute quitclaim deeds to each and all of the hereinafter mentioned members, or to enter satisfaction on the margin of the record as required by law, releasing their respective deeds of trust given to secure each and all of said obligations, and in full discharge thereof.

"And be it further resolved that the loss, if any, sustained by said association on account of said shares of stock not having earned their face or maturity value, upon which said loans or advancements were obtained, be, and the same is hereby ordered, to be equally charged to all of said nonborrowers or free stockholders in said association, and such borrowing members who do not hold definite contracts for the maturity of their loans, and that the same be borne by and equally distributed and apportioned to all the free and nonborrowing stockholders in said association in proportion to the number of shares held by each."

The plaintiff next alleges that the directors of the association propose and intend to carry out said resolution and release the deeds of trust therein referred to, notwithstanding the shares of such borrowing members have not earned the full face or

maturity value thereof. The petition further alleges that the shares of such borrowing members ³⁵¹ have only earned, and consequently are only worth, the sum of one hundred and forty-one dollars and fourteen cents per share, and that if the deeds of trust given by such borrowing members are released and their notes canceled, then such borrowing shareholders would receive upon their shares fifty-eight dollars and eighty-six cents per share in excess of their actual value, thereby causing a resulting loss to the association in the amount of such excess, which loss would fall upon and be borne wholly by the plaintiff and other free shareholders similarly situated; and that the contemplated act of the directors is an unjust and unwarranted discrimination in favor of such borrowing shareholders, and against the rights of the free and unborrowed stockholders, and violative of the rights of mutuality between the respective members of said association.

It is further alleged that all of the deeds of trust sought to be released contain clauses providing that the same shall be released at the end of one hundred months, providing the dues, interest, and penalties thereon shall have been paid for the full period of one hundred months, which provisions, it is claimed, is ultra vires and void, and in violation of the principles of mutuality between members, and in violation of the statutes of this state governing building and loan associations; and that the directors had no power to make such contracts with its borrowing stockholders; and that there was no by-law of said association authorizing the making of such contracts; and that in causing such provisions to be inserted in the deeds of trust in question the directors acted beyond the scope of their authority, to the injury and prejudice of the plaintiff and other nonborrowing members of the association.

The petition prays that the defendants be enjoined and restrained from carrying out the provisions of said resolution and releasing the deeds of trust and other obligations of such borrowing stockholders until their shares of stock shall have reached their full face or maturity value, notwithstanding ³⁵² their deeds of trust provide that their shares of stock shall be deemed to have matured at the end of one hundred months.

After admitting that the shares of stock pledged by the borrowing members had not reached their full face value at the expiration of the one hundred month period, the answer, among other things, avers, in substance, that if said contracts were beyond the power of the association to make, then and in that

case the contract, made and entered into as aforesaid, would, under the statute, be usurious and subject the association to a greater loss than to carry out the same according to their terms.

It was further averred that if the association is enjoined from releasing the deeds of trust in question that it will be compelled to defend a greater number of suits in different circuit courts in this state and put to great expense and cost of litigating with a large number of borrowers who hold like definite contracts.

The answer further avers that if said contracts were not valid and binding upon the association, then the loan in question was usurious, for the reason that the by-laws of the association provided that the accumulated funds of the association should be loaned at a minimum premium, and that all of the loans or advancements in question were made in pursuance of such by-laws, and that during the entire period of one hundred months such borrowers had paid such fixed and stated premiums, and, if the association was enjoined from carrying out its contract in this regard, the association would be compelled to account to such borrowers for the entire amount of interest, premium, and dues paid by them during the existence of their loan, which amount would greatly exceed the amount due on the money borrowed, and the association compelled to pay the same, thereby sustaining much heavier losses than would be suffered by the ³⁵³ free shareholders if the officers of the association were permitted to carry out the resolution. The reply was a general denial.

The deeds of trust ordered released by the resolution in question were executed in 1890, to secure loans or advancements to the several borrowers named in the resolution. These advanced members have paid their monthly dues, interest, and premium for the full period of one hundred months, as required by their contract, but their shares of stock have not yet matured or reached their full face value, being worth only one hundred and forty-one dollars and fourteen cents per share. Consequently, if the resolution is carried out and the deeds of trust released, there will be a resulting loss to the association of fifty-eight dollars and eighty-six cents on each remaining share of stock therein, which must be borne wholly by the free and nonborrowing stockholders. All the deeds of trust covered by such resolution, together with the obligations secured thereby, contain the following provision, to wit:

"The payment of said monthly sum of — dollars, being the monthly dues, interest, and premium for the full period of said one hundred months, and of all fines and penalties, shall

entitle each of said shares of stock to redemption by said association at the par value of two hundred dollars each, and the said shares so entitled to redemption shall, at the end of said hundred months, be taken and canceled by said association in full satisfaction of this obligation and of the deeds of trust given to secure the same; in consideration of which said redemption of said shares of stock, and the satisfaction of this obligation and said deed of trust at said end of one hundred months, we do hereby waive and release all other or further right, interest, and benefit in or to the profits and earnings of said association, and hereby transfer and assign the same to said association."

The above contract appearing in the deed of trust is the basis of defendant's contention that the deeds of trust ³⁵⁴ should be released at the expiration of one hundred months, regardless of the fact that the stock so pledged had not matured.

The plaintiff is a nonborrowing stockholder, holding twenty-five shares of stock in the association of the par value of two hundred dollars each, having subscribed therefor on April 20, 1894.

The borrowing members, mentioned in the resolution directing a release of their several deeds of trust, having paid all their monthly dues, installments, and premiums in accordance with the terms of their obligations for the period of one hundred months, applied to the association for a release of their deeds of trust and the cancellation of their pledged shares, but the association refused to satisfy and cancel same. Thereupon several suits by borrowing stockholders were instituted against the association in different circuit courts throughout the state to obtain decrees canceling their notes and deeds of trust. Certain of said cases having been decided adversely to the association, the resolution adverted to was passed by the board of directors of the association, but, before it had been complied with by the officers of the association, this action was commenced to enjoin defendants from carrying out the provisions of the resolution and to restrain the directors from entering satisfaction of such deeds of trust at the end of the one hundredth month.

The evidence shows that the shares of stock pledged by the borrowing members, whose deeds of trust are sought to be released, have not matured, but, on the contrary, are only worth one hundred and forty-one dollars and fourteen cents per share. It further appears that it is utterly impossible to carry out the

agreement to mature these shares in one hundred months, and also to mature the shares of plaintiff and other free shareholders containing a similar provision as to the time of maturity.

The plaintiff contends that the special clause contained in the note and deeds of trust under consideration, providing for a release thereof at the expiration of a period of one ³⁵⁵ hundred months from their date, regardless of the maturity of the stock, is ultra vires and void, and in violation of the statutes of this state governing building and loan associations, and that such clause is violative of the principle of mutuality between the stockholders contemplated by the statute, and beyond the power of the association.

These contentions raise the question whether the statute of Missouri governing building and loan associations, and the by-laws of the association passed in conformity therewith, must be treated as forming a necessary part of the contract, and the borrowers' obligations made to conform therewith, or whether the acceptance of the borrowers' notes and deeds of trust containing the special clause in question is binding upon the association, regardless of its earnings, especially where, as is this case, these provisions cannot be carried out without entailing a loss of fifty-eight dollars and eighty-six cents upon the free and nonborrowing shareholders. In other words, whether the contracts as written should prevail, or whether the statute then in force should be so read into the contract as to prevail over its language.

Section 2812 of the Revised Statutes of 1889, in regard to building and loan associations, provides that the directors of the associations shall hold stated meetings at which such sums of money as may be determined shall be offered for loan to all the members in open meeting. The shareholder who shall bid the highest for the preference or priority of the loan shall be entitled to receive the loan, whose amount shall not exceed the number of shares of stock held by such shareholder multiplied by the par value thereof. Good and ample security shall be given by the borrower to secure the monthly payments contracted to be made by him.

Section 2813 provides that a borrower may repay a loan at any time. In case of the repayment of the loan before the expiration of the one hundredth month after the organization of the corporation, there shall be refunded to such ³⁵⁶ borrower

one per cent of the premium paid for every month of said hundred months then unexpired.

Section 3, article 1, of the by-laws of the association provides as follows: "Upon each and every share of stock there shall be paid as follows, viz., upon shares of two hundred dollars each the sum of one dollar per month, and upon shares of one hundred dollars each the sum of fifty cents per month, and upon shares of four hundred dollars each the sum of two dollars per month, as dues until the dissolution of the association or the maturity of the series in which said stock shall be issued."

By section 3, article 2, it is provided that at each monthly meeting of the association the funds on hand shall be offered for loan, and the shareholder who bids the highest premium per share for the preference or priority of the loan shall be entitled to receive the par value of the stock, less the amount of said premium.

Section 5, article 2 of the by-laws provides that before receiving said loan the borrower shall submit a full description of the property offered as security for the same, et cetera, and, upon acceptance of such security by the board of directors, shall execute his note for the par value of said stock so bid off or redeemed.

By section 6, article 2, of the by-laws, it is provided that the condition of said note shall require the payment of monthly dues on the shares so redeemed, and the monthly payment of interest on the face value of said note at the rate of seven and two-twentieths per cent per annum. And section 7 provides that a deed of trust shall be executed on the borrower's property to secure compliance with the conditions of his note, and also the performance of all obligations imposed upon him by the rules of the association.

The significance of the statute and by-laws referred to is apparent. Neither the statute nor the by-laws authorize the fixing of a period of one hundred months at which the stock shall reach its par value. At best, it is but a mere ³⁵⁷ estimated period within which the stock will mature, and in no sense of the word a guaranty that the shares should mature within that length of time, and is applicable only in determining the amount of premium to be returned to the borrower who repays his loan before the expiration of the one hundredth month from date of loan. Under this section, if the borrower repays his loan before the expiration of the one hundredth month he receives back a certain per cent of the premium paid. It was

never contemplated that this section should have the effect of maturing the stock at the expiration of one hundred months, regardless of the earnings of the association. If the statute governing building and loan associations, and the by-laws passed in conformity therewith, fixed no definite or arbitrary period at which the shares shall reach their par or maturity value, for a greater reason the association, a mere creature of the statute, cannot fix an arbitrary period of one hundred months or any other time within which the shares of its members shall reach maturity.

The law governing the formation of building and loan associations contemplates a scheme for paying the capital stock in installments, so long as such periodical payments, taken in connection with its other income arising from fines, dues, interest, and profits, are necessary in order to bring the stock up to par. This value represents the amount which the shares are expected to be worth, when, together with the profits upon investments, et cetera, it has accumulated to the amount contemplated at the outset. The actual value of the share may be very small indeed during the first years of the association's existence. But the par value is fixed from the beginning. The association may be said to have accomplished the purpose of its organization when, by the periodical payments made by its members, and the gains therefrom, each member has paid up to the amount fixed by its charter: Endlich on Building Associations, 2d ed., sec. 12.

³⁵⁸ It is a well-settled proposition that the transaction between the association and its members is not a loan in a direct sense of the word, but only a prepayment or advancement to the shareholders of that to which he will ultimately be entitled. When a borrower pays a premium on account of an advancement made on his stock, his agreement is that he will, at the time of making the loan, sell to the association his prospective interest therein for such percentage, less the par or paid-up value of his stock as he may at the time of such advancement agree to pay. That is to say, he sells his prospective interest to the association for par if he has no competitors, but if there are others bidding for competition with him for preference and priority, then he sells his prospective interest for such a sum as he is forced by competition to deduct therefrom. The transaction is regarded then in the light of a sale by the borrower to the association of his prospective interest, the association paying him, at a time when he needs the money, the amount which

would be due him at the time of the dissolution of the association in the ordinary course of business. Endlich on Building Associations, second edition, section 331, in speaking of the advancements of the association to its borrowing members, thus states the rule: "As to the repayment of the principal, the design is most simple. The member, bound by his original contract with the association to make stated periodical payments of fixed amounts, strengthens his undertaking, to the greater security of the association which has parted with its funds to him by mortgaging his property as a pledge for such discharge to the end of the society's existence. . . . The member, mindful of the impossibility of evasion, continues to pay his regular dues. These, together with all similar payments made by the other members, and together with all the revenues from whatever sources flowing into the society's coffers, are added to the common treasury and again made the means of securing new profits, until the ³⁵⁹ period arrives when the association is ready to wind up. The shares, his own interest in the society's accumulations, have now reached their contemplated value. But the borrower has anticipated that result, and in so doing has given the association the right to make itself whole, to reimburse itself not only for what it has given him, but also for what he has agreed to add to that amount by way of premium offered, out of the sum standing to his credit as a member of this society. That sum is necessarily the amount he has received, plus the premium he has bid. The society appropriates this and the principal is repaid."

Again, in section 338, the same author says: "Whatever is paid by the borrower by way of premium, interest, dues, fines, et cetera, becomes a portion of the common fund, and, being reinvested, adds its profits to the great bulk in which he has a proportionate interest; and these, being again reinvested, and so on ad infinitum, continue to swell the assets of the association until, in due course of time, distribution can be made, and advanced members may be relieved of their obligations. Thus the borrower himself profits by his own payments."

The question as to the rights and obligations of the stockholders and the association has received much consideration of late in several of our sister states, and the trend of the more recent decisions is that any contract made by such an association in contravention of the statute and its by-laws is ultra vires and void.

All members must participate equally in the profits and bear the losses, if any, in the same proportion. This is the fundamental law of building and loan associations organized under the different statutes throughout the Union. The provisions in the borrower's notes and deeds of trust sought to be released, to the effect that the shares of stock pledged to secure their payment shall reach their full par value at the end of one hundred months, and the securities canceled and satisfied regardless of the earnings of the association, ³⁶⁰ is clearly subversive of the legislative scheme governing building and loan associations and contrary to the clear letter and spirit of our statutes. The plan which seems to have been adopted by the association in respect to the loans in question is glaringly prejudicial to the nonborrowing members, and its enforcement will work a great injustice and hardship. Besides, it would be inequitable and unfair. The rights of the borrowers must be determined from the standpoint of their relation to the nonborrowing stockholders. The former voluntarily applied to and became members of the association, and the by-laws not repugnant to the statute are binding upon them as well as upon the other members of the association. One who becomes a member of an association becomes chargeable with the knowledge of the provisions of its charter and by-laws, and is bound by them. He cannot be ignorant of them, nor can he refuse obedience to them, unless, indeed, they are illegal, or require the performance of acts which the law forbids. By-laws not illegal, and not requiring the performance of acts contrary to law, must, therefore, be deemed binding upon all persons who become members: 1 Beach on Private Corporations, sec. 321; Endlich on Building Associations, sec. 271; Mechanics' etc. Assn. v. Vierling, 66 Ill. App. 621. The provisions of the by-laws, as already seen, provide for the payment of dues, interest, et cetera, by stockholders until such time as their shares shall mature and the stock be worth its full par value. And if the borrowers did not read the by-laws it was their fault.

The association, being organized under a mutual plan, must treat all of its members equally, and any contract whereby one stockholder obtains greater share of profits than another would be violative of the principle of mutuality between the stockholders. The plainest principles of justice and honesty clearly forbid that one class of stockholders equally meritorious should be compelled to suffer ³⁶¹ that others may profit thereby. In the last reported case to which we have been cited on the sub-

ject—*King v. International etc. Union*, 170 Ill. 135—the court there holds that a building and loan association, organized and based on the mutual plan, requiring subscription to its capital stock to be made in periodical payments, which should continue until the payments, together with the earnings of the association should equal the full face value of the shares, has no authority to issue a certificate of stock wherein it agrees to pay the subscriber the full face value of each share at the end of six years, on payment of seventy-five per cent per month on each share during said period. In the case of *Wierman v. International etc. Union*, 67 Ill. App. 550, the appellate court of Illinois held that a building and loan association is a mutual company, and bound to treat its members equally, and any contract made by such association in contravention of such mutuality is ultra vires and void. To the same effect is *Baltimore etc. Assn. v. Powhatan Imp. Co.*, 87 Md. 59.

The same conclusion was reached by this court in bank in the recent case of *Fisher v. Patton*, 134 Mo. 32. In that case Fisher, a stockholder, sought to enjoin the directors of the Richmond Building and Loan Association from releasing certain deeds of trust given by borrowing members to secure advancements made on their shares of stock, and from releasing other securities held by the association, and to prevent the association from discontinuing the collection of its interest, dues, and penalties from the stockholders until the assets of the association were sufficient to enable each share of stock to be matured by obtaining its par value of two hundred dollars. The court held that any stockholder could maintain a suit to restrain the directors of the association from closing out a series of shares before its maturity, and from releasing securities of borrowing members, and other acts ³⁶² tending to prevent the stockholder's shares from obtaining their full par value. Building and loan associations, as already seen, are created for certain purposes, and there is an implied contract with its members that it shall not divert its funds or powers to other purposes. Such diversion would be violative of the statute under which it was organized, as well as the principles of mutuality between the members.

In the case of *Insurance Co. v. Leslie*, 47 Ohio St. 409, a question of relation to the waiver by agreement found in the policy of certain statutory provisions was considered. Referring to these provisions, the supreme court of Ohio says: "These sections were in force when the policy in suit was issued and en-

tered into, and became a part of the contract of insurance, fixed the measure of obligation created by it and controlled its construction and operation. . . . The statute rests upon considerations of public policy. . . . The statute cannot be treated as conferring upon the insured a mere personal privilege which he may waive or qualify by agreement. It has a broader scope. It molds the obligations of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability." To the same effect is *Havens v. Germania Fire Ins. Co.*, 123 Mo. 416, 45 Am. St. Rep. 570; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638; *Reed v. Painter*, 129 Mo. 680.

In *Wall v. Equitable Life Assur. Soc.*, 32 Fed. Rep. 273, the question arose whether the statute of this state providing that a policy of insurance should be nonforfeitable after two annual premiums had been paid should prevail in a suit on a policy (executed in this state while this statute was in force) which by its terms required the payment of three annual premiums before the policy became nonforfeitable. In other words, the question is very similar to the one raised by this record, that is to say, whether the provisions of the borrowers' obligations and deeds of trust ³⁶³ should prevail, or whether the statute and by-laws then in force should be so read into the contracts as to prevail over the special clause above mentioned. Mr. Justice Brewer, who wrote the opinion, said: "It was evidently intended by its (the state's) legislation to provide a fixed and absolute rule applicable in all cases—absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. The legislature has, by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state, and it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and their spirit."

In the case of *Latimer v. Equitable etc. Co.*, 81 Fed. Rep. 776, recently decided by the United States circuit court for the western district of Missouri, the question arose whether the

statute of Missouri permitting a member to withdraw at any time was to be treated as forming a necessary part of the contract, or whether the acceptance of a certificate with a clause curtailing the right of withdrawal to a period of less than one hundred months from its date is binding upon a stockholder, and the court held that the statutory right of ending the stockholder's relation to the association by withdrawal was a fundamental right evidencing a public policy which cannot be waived or contracted away by any one or more members of the association, and that the plaintiff in that ³⁶⁴ case, having given the requisite notice, was entitled to recover the amount paid on his stock, notwithstanding the terms of his certificate postponing the exercise of this right until an unexpired term of one hundred months shall have elapsed. It seems to us that this case is exactly in point.

The question here was not involved in *Sawyer v. Menominee etc. Assn.*, 103 Mich. 228, and like authorities cited by defendants in support of their contention. That case bears little or not at all upon the question here; besides it was decided by a divided court. In that case the secretary of the association, in setting forth the advantage to be gained by a borrower, among other things represented that such borrower could pay a loan at any time, at the end of any quarter, and could settle on the basis of the loans being canceled in eight years, and at one-eighth thereof each year, taking the actual money loaned as the basis, and, so far as settlement was concerned, disregard the premium for the loan. The secretary explained that the association could do this because of the advantages it had in compounding interest monthly and receiving interest on installments and premiums, and that the right to settle on this basis was guaranteed by the by-laws. Whatever may be the justification of the Michigan court for its treatment of the question the rule announced in that case has no application to the altered facts presented by this record. Here there was no representation of facts fraudulent or otherwise, while in that case the secretary went further than merely expressing his opinion as to the outcome of the loan under the by-laws of the association as a result of its financial operations, and made the distinct representation, on which the borrower acted, that the premium bid for the loan might be disregarded by the borrower in liquidating his indebtedness.

In the light of the foregoing authorities, we think that the provisions of the notes and deeds of trust in question ³⁶⁵ are

in contravention of the chartered powers and by-laws of the association, and subversive of both the letter and spirit of the legislative scheme governing building and loan associations in this state, and beyond the powers of the board of directors.

No question as to the usurious character of the loan under consideration properly arises in this case, as appellants contend, but if it did, and was for determination, but one conclusion could be reached on the facts disclosed by the records herein. Notwithstanding the positive allegations in defendant's answer, "that in the by-laws of the association it was provided that the accumulated funds of the association should be loaned at a fixed minimum premium, and that all the loans or advancements in question were made in pursuance of said by-law," the secretary of the association, when testifying at the trial in this case, says that each and every loan made by the association to its borrowing members was upon competitive bidding in open meetings, and that the by-laws of the association provide and require all bids for money to be so made. A copy of the by-laws to that effect was also offered and read in evidence. The facts, as disclosed by this record, show conclusively that the loans to the borrowing members was not usurious.

It follows from what has been said that the judgment of the circuit court should be affirmed.

Gantt, C. J., Burgess, Williams, and Marshall, JJ., concur, Brace, J., not sitting.

BUILDING AND LOAN ASSOCIATIONS.—THE NATURE OF THE TRANSACTIONS between building and loan associations and their members is by some courts deemed to be a loan, and by others a dealing with partnership funds: Monographic note to Robertson v. Homestead Assn., 69 Am. Dec. 160; Meroney v. Atlanta Bldg. etc. Assn., 116 N. C. 882, 47 Am. St. Rep. 841.

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS.—The members of a building and loan association are equally entitled to share in its gains; and it would seem to be a consequence that each member is under an obligation to contribute his share of its necessary losses and expenses: Monographic note to Robertson v. Homestead Assn., 69 Am. Dec. 154.

BUILDING AND LOAN ASSOCIATIONS—POWERS.—The general rule that corporations may make any contract fairly within the purposes and objects of their incorporation, except where prohibited by their charters or by other statutes, applies to building and loan corporations; as also does the converse of this rule, that contracts of a corporation which are not within any of the powers expressly or impliedly conferred upon it are ultra vires: Monographic note to Robertson v. Homestead Assn., 69 Am. Dec. 157.

PERKINS v. MEIGHAN.

[147 MISSOURI, 617.]

JUDICIAL SALES—TITLE OF PURCHASER—LAND NOT OWNED BY JUDGMENT CREDITOR.—Where two people enter into a verbal agreement that one of them will furnish the purchase price of certain land, and that the other will attend to the purchase of the land in consideration of receiving one-half of the profits which may later accrue from a resale of the land, and the land is so purchased, the second party taking a deed in his own name, and later, by two separate conveyances, transferring to the first party first one and then the other undivided half of the land, the second party at no time has an interest in the land subject to seizure and sale under execution. A sale of an undivided half of the land, under a judgment rendered against the second party subsequent to his conveyance of the second undivided half, and decreed in disregard of such conveyance, passes nothing to a purchaser thereat.

C. W. Hamlin, for the appellant.

George Pepperdine, for the respondent.

619 **BURGESS, J.** This is a suit in equity to have set aside a warranty deed from defendant Meighan to his codefendant Mrs. Lizzie D. Nunn, dated on the fourth day of December, 1893, for an undivided one-half of a tract of land in Greene county, and to have the title thereto vested in plaintiff.

Some time prior to the fourth day of October, 1891, the defendants entered into a verbal agreement, by the terms of which Mrs. Nunn was to furnish the money to purchase eighty acres of land thereafter, to be sold at administrator's sale in said county, and if purchased under this arrangement it was again to be sold, and after reimbursing her with the amount of the purchase money, interest, taxes, and cost, whatever balance there was, if any, was to be divided equally between them.

The land was sold at an administrator's sale on the fourth day of October, 1891, when Meighan became the purchaser at the sum of four hundred dollars, and received the administrator's deed therefor, by which the land was conveyed to him. The purchase money was furnished by Mrs. Nunn.

On October 14, 1891, Meighan conveyed to Mrs. Nunn an undivided half interest in the land, and on the fourth day of December, 1893, he conveyed the other undivided half interest to her. It is this last deed which is sought to be set aside upon the alleged ground that it was made without consideration, **620** and in fraud of the creditors of Meighan. No consideration passed for the deed.

On December 5, 1893, one day after Meighan had executed the last deed, plaintiff obtained judgment in the circuit court of Greene county against him upon which an execution was duly issued, levied upon, and all the interest of Meighan in the land in question sold, at which sale plaintiff became the purchaser of the land and received the sheriff's deed therefor.

The court found for the plaintiff, and that the property was originally purchased jointly by Meighan and Mrs. Nunn. That Mrs. Nunn had furnished the purchase money. That Perkins was entitled to Meighan's part, an undivided one-half interest after Mrs. Nunn had been reimbursed with four hundred dollars and interest, and decreed a sale, and out of the proceeds of such sale, after the payment of costs and the payment to Mrs. Nunn of the four hundred dollars and interest thereon, the balance should be divided equally between Perkins and Mrs. Nunn. After unsuccessful motion by Mrs. Nunn for a new trial she appeals.

The facts disclosed by the record in this case do not, we think, justify the judgment and decree of the trial court, and for these reasons: In the first place, according to the testimony of Mrs. Nunn, Meighan never had any interest in the land. He never paid a dollar of the purchase money; she so stated in so many words, and her statements were not in any manner contradicted. It is true that she testified that Meighan came to her house and told her that he knew where a piece of property could be bought in if he could raise the money, that he could make some money out of it, that he asked her if she thought she could raise the money, and that she told him she thought she could. That he then said if she could raise the money, after the expenses were all paid, the interest, taxes, and all that, they could sell it and divide the profits; but there is nothing in these statements or in the evidence which will justify the conclusion that he was to own one-half interest ⁸²¹ in the land, especially in the face of the fact that she furnished all of the purchase money. The fact that he purchased the land and took a deed thereto in his own name, and recently thereafter deeded to her an undivided one-half, and shortly before the institution of this suit the other, does not overcome the positive testimony of Mrs. Nunn that he had no interest in the land. Besides, she testified that she did not know why he took the deed in his own name, and there was no evidence tending to show that it was by her consent. The evidence, we think, clearly shows that Meighan had no interest in the land: that he was

only to have one-half of the profits arising from its sale after deducting the purchase money, interest, taxes and costs; and, having no interest in the land, nothing passed to plaintiff by reason of his purchase and sheriff's deed.

In the second place, even if Meighan owned an undivided half interest in the land, and plaintiff acquired it at a sheriff's sale, he would first be compelled to have the deed from Meighan to Mrs. Nunn set aside, before he could recover in ejectment, and there is no count in ejectment in the petition.

The most that plaintiff was entitled to under the petition, even if entitled to any relief at all, was to have the deed set aside because voluntary and fraudulent as against creditors. But upon no view of the case was the decree rendered warranted by the pleadings and the evidence.

The judgment is reversed.

Gantt, P. J., and Sherwood, J., concur.

JUDICIAL SALES.—TRUST INTERESTS were not subject to execution at common law: *Chase v. York County Sav. Bank*, 89 Tex. 316, 59 Am. St. Rep. 48. Trust property is not subject to execution under a personal judgment recovered against a trustee: *Bostick v. Kelzer*, 4 J. J. Marsh. 597, 20 Am. Dec. 237. A naked legal title, held in trust, cannot be sold on execution at law: *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600.

STATE v. BURNS.

[148 MISSOURI, 167.]

HOMICIDE—INDICTMENT.—A MOTION TO QUASH an indictment for murder is properly denied, where it charges every fact essential to a good indictment for that crime, and is in the most approved form.

TRIAL.—A CONTINUANCE TO PROCURE WITNESSES IS PROPERLY REFUSED where little or no diligence has been exhibited in getting them.

HOMICIDE—INSTRUCTIONS—INFIDELITY—JEALOUSY. In a murder case, where the defendant is charged with having killed his wife, it is proper to instruct, on behalf of the prosecution, that, if he killed her because she was unfaithful to her marriage vows, or killed her because of his jealousy, he is guilty of murder in the first degree.

WITNESSES—IMPEACHMENT—STATEMENT.—Upon the trial of a defendant for murdering his wife, where his mother has testified that he would not kill his wife because he loved her so, and denied that she told another witness, immediately after the killing, and in the presence of the dying woman, that the defendant had said that "if he ever saw Mag again he would kill her, and die

or go to the pen. and now he has made his word good," it is proper to ask such other witness, for the purpose of impeachment, whether the defendant's mother had made such statement, because, if she did, she knew that the defendant had threatened to kill his wife.

TRIAL—QUALIFICATIONS OF JURORS—RESIDENCE.—If a juror is an old resident of the state, is a citizen of the county, has resided therein and voted at a late election, and has expressed an intention of voting therein again at the next general election, he is a resident of the county.

TRIAL—CRIMINAL CASES—POLLING JURY.—The trial court, in a criminal case, is not bound to poll the jury, of its own motion, without a demand therefor by the defendant or his counsel.

Albert De Reign, for the appellant.

Edward C. Crow, attorney general, and Sam B. Jeffries, assistant attorney general, for the state.

170 GANTT, P. J. The defendant, a negro man, was convicted in the circuit court of Scott county, of murder in the first degree, and appeals from the sentence.

The defendant and his wife, Mag Burns, resided with the defendant's mother in the town of Commerce, in Scott county. They had been married about two years. The evidence shows defendant had maltreated his wife and she had left him several days prior to the 24th of July, 1897.

On the morning of that day, the wife called upon the constable, Mr. Watson, and requested him to go with her to her husband's home to get her clothing, saying she was afraid to go by herself, that he would kill her. The constable accompanied her. The defendant was not at home when they first went to the house.

The constable asked defendant's mother to give the wife her clothing, but she refused. While they were talking in the yard in front of the house, defendant returned, and the constable told defendant what they wanted. He replied "all right," passed into the house and soon emerged with a double-barrel ¹⁷¹shotgun in his hands and opened fire, first shooting the constable, and, as his wife ran, he shot her in the back, the load going entirely through her body. The constable managed to get back to the marshal's office, and sent him to arrest defendant. The defendant's wife died almost instantly in the garden of the lot on which she was shot.

At the October term, 1897, the grand jury returned the following indictment: "The grand jurors for the state of Missouri, duly impaneled, charged, and sworn to inquire within and for the body of Scott county, Missouri, upon their oaths present

and charge that one Will Burns, at the county of Scott, and state of Missouri, on the twenty-fourth day of July, A. D. 1897, in and upon one Mag Burns, then and there being, feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought, did make an assault, and with a dangerous and deadly weapon, to wit, a shotgun loaded then and there with powder and leaden balls, which he, the said Will Burns, in his hands then and there had and held at and against her, the said Mag Burns, then and there feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought, did shoot off and discharge; and with the shotgun aforesaid and the leaden balls aforesaid, then and there feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought, did shoot, strike, and penetrate and wound her, the said Mag Burns, in and about a vital part of the body of her, the said Mag Burns, to wit, in the back part of the body of her, the said Mag Burns, giving to her, the said Mag Burns, at the said county of Scott, and state of Missouri, on the said twenty-fourth day of July, 1897, with the dangerous and deadly weapon, to wit, the shotgun aforesaid, and the powder and leaden balls aforesaid, in and upon the back part of the body of her, the said Mag Burns, one mortal wound, of the width of about one inch, and of the depth of about three ¹⁷² inches, of which said mortal wound she, the said Mag Burns, at the county of Scott, and state of Missouri, on the said twenty-fourth day of July, 1897, then and there of the mortal wound aforesaid instantly died; and so the grand jurors aforesaid do say that he, the said Will Burns, her, the said Mag Burns, in the manner and by the means aforesaid, feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought, at the said county of Scott, and state of Missouri, on the said twenty-fourth day of July, A. D. 1897, did kill and murder against the peace and dignity of the state."

The court, on application of defendant, appointed counsel to defend him. The cause was continued on application of defendant to the April term, 1898. At the April term, a motion to quash the indictment was filed, heard, and overruled.

Another application for continuance was filed, on account of an absent witness, one Snow, whose residence was alleged to be in Charleston, Mississippi county, but at the time absent in Paducah, Kentucky. This motion was likewise overruled, and thereupon defendant was arraigned and pleaded not guilty. A jury was impaneled, the evidence heard, and a verdict of guilty

of murder in the first degree, as charged in the indictment, rendered.

1. The motion to quash was properly denied. The indictment charged every fact essential to a good indictment for murder.

The objection that it fails to charge a deliberate, premeditated, felonious killing is without foundation. It is in the most approved form and follows long-established precedents: *State v. Snell*, 78 Mo. 240; *State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271; *State v. Green*, 111 Mo. 585; *State v. Kindred*, 148 Mo. 270; 3 *Chitty's Criminal Law*, 752; *Wharton's Precedents*, 117a, 117b.

2. Neither can we convict the circuit court of error in refusing a continuance at the April term. It was a matter largely in its discretion, and little or no diligence was exhibited in the attempt to get the witness Snow.

3. The court instructed on murder in the first and second degrees, and no exception was taken to the failure of the court to instruct upon any other grade.

The instructions, in fact, covered every phase of the case, and were very liberal to defendant. There was really no substantial evidence which justified the instruction given in behalf of defendant on the plea of insanity.

The objection to the state's instruction that if defendant killed his wife because she was unfaithful to her marriage vows, or killed her because of his jealousy, he was guilty of murder in the first degree, is without merit. There was ample evidence that this was the reason he killed her. This identical instruction was approved by this court in *State v. Anderson*, 98 Mo. 473, 474; *State v. France*, 76 Mo. 681; *State v. Holme*, 54 Mo. 153; 2 *Bishop's New Criminal Law*, sec. 708; *State v. Sawyer*, 35 Ind. 80.

4. The objection to the impeaching evidence of Clara Hunter was properly overruled. Defendant's mother was a witness and had testified to going into the house immediately upon defendant's return home and shutting the doors, and saying she was going to take care of no one; that she didn't know what he would do; that she had warned Watson and defendant's wife to go away, and that she had asked her son, What is the matter with you, are you crazy, or what is the matter?

The inference is inevitable that she anticipated the tragedy from what had occurred between herself and defendant. She was asked if she didn't tell Clara Hunter immediately after the

shooting, in the presence of the dying woman: "That is just what Will said, if ever he saw Mag again he would kill her, and die or go to the pen, and now he has made his word good." She denied making the statement.

¹⁷⁴ Clara Hunter was a witness, and she was asked if defendant's mother made this statement to her and testified that she did. It was competent to impeach the witness as to this statement. She had testified defendant would not kill his wife because he loved her so, and, if she made the statement imputed to her, she knew he had threatened to kill her, and, if the jury believe the impeaching witness, it would go far to weaken her other testimony.

5. The point that the constable, Watson, assisted the sheriff in his duties about the courthouse after having testified as a witness in the cause is wholly without merit. He did not select or summon any juror, and had no connection whatever with the jury.

Equally groundless is the point that one of the panel of jurors was not a resident of the county. The testimony largely preponderated that he was a citizen of Scott county, had resided at Vanduser, had voted at the spring election in said county, and had expressed his intention to vote that fall at the general election in said county; that he was an old resident of the state.

Counsel has the merit of originality in assigning as error the failure of the court to poll the jury of its own motion without a demand therefor by defendant or his counsel.

It is probably the first time in the history of jury trials in this state that such a contention has arisen. It is not strange, however, that it has never been asserted before, for the reason that there is no merit in it.

6. Counsel for the state did not transcend the evidence in alluding to the impeaching evidence of the witness Clara Hunter. He repeated her evidence verbatim in commenting upon the evidence of defendant's mother. It was legitimate for that purpose, and was employed in that way only.

7. Upon the merits, the testimony establishes murder in the first degree. It is another case of wife murder, a ¹⁷⁵ class of crimes which has become very common. We have been called upon to consider three cases at this call of the docket, in which unoffending and helpless women have been shot down or butchered without the slightest provocation. The circumstances surrounding the killing are pregnant of a deliberate and premeditated purpose on the part of the prisoner to shoot his

wife. She reckoned well when she declined to go after her clothing without the protection of an officer of the law.

She understood all too well the malignity of the defendant's nature. The cowardly and brutal shot in the back of the fleeing, unoffending woman, the use of the deadly weapon, the opportunity to brood over her leaving him, the preparation of the gun, the significant conduct of his mother running into the house and closing the door in anticipation of the shooting, all combine to dissolve every doubt that the crime is one of murder in the first degree, and the jury properly responded to their duty in so finding.

The case has no mitigating circumstances in it, and as there is no error in the record, the judgment of the circuit court is in all things affirmed, and it is ordered that the sentence of the law be executed.

Sherwood and Burgess, JJ., concur.

TRIAL—CONTINUANCE—ABSENCE OF WITNESSES.—To procure a continuance on account of absent witnesses it must appear that the party applying has not been guilty of any laches or neglect in trying to procure them: Note to State v. Williams, 63 Am. St. Rep. 872.

HOMICIDE—MURDER—ADULTERY—JEALOUSY.—It is murder for a husband to kill one who has previously committed adultery with his wife, and who the prisoner believed at the time of the killing, was accompanying his wife for the purpose of committing adultery: State v. Samuel, 3 Jones, 74, 64 Am. Dec. 596, and note showing that every homicide prompted merely by a spirit of revenge, or jealousy, is murder.

WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS.—A witness may be impeached by showing that he made statements out of court contradictory to his evidence as a witness: Notes to Consolidated Ice-Machine Co. v. Kelfer, 23 Am. St. Rep. 695; Holmes v. State, 16 Am. St. Rep. 20; Watkins v. State, 14 Am. St. Rep. 157; Leahey v. Cass Ave. etc. Ry. Co., 10 Am. St. Rep. 306; Quinn v. New York etc. R. R. Co., 7 Am. St. Rep. 288.

STATE v. MATTHEWS.

[143 MISSOURI, 185.]

HOMICIDE — MURDER — SELF-DEFENSE — EXPRESS MALICE.—A person who kills another in self-defense is not guilty of murder, though he bore express malice toward the deceased.

HOMICIDE—SELF-DEFENSE—RIGHT OF ATTACK.—It is not generally true that the right of self-defense does not imply the right of attack. A person about to be attacked is not bound to wait until his adversary gets "the drop on him," or "draws a bead on him," before he takes steps to defend himself. but he may safely act upon appearances, and even kill his assailant, if that is necessary to avoid great bodily harm apprehended by the slayer.

HOMICIDE—KEEPING OUT OF THE WAY—SELF-DEFENSE.—A person who expects another to attack him is not bound to keep himself out of the way of being assaulted, and, if he kills his assailant to avoid great bodily harm, he may rely upon the plea of self-defense.

HOMICIDE — MANSLAUGHTER — RESISTING A TRESPASS ON PROPERTY.—A person, though on his own terra firma, is not justified in killing another because the latter tears down his fence or carries it off, but if the killing of the trespasser is done in a heat of passion, engendered by such acts, it is nothing more than manslaughter in the fourth degree.

HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.—An instruction, in a murder case, that the defendant was not justified in shooting the deceased because the latter was removing the former's fence, is erroneous and misleading, because it does not go far enough. It should further state that if the killing was done in hot blood, engendered in the defendant, by the acts of the deceased, it would be only manslaughter in the fourth degree.

HOMICIDE — MANSLAUGHTER — SELF-DEFENSE — INSTRUCTIONS.—A plea of the defendant, in a murder case, that the killing was done in self-defense does not deprive him of his right to an instruction based on the claim that the killing was manslaughter in the fourth degree.

A. H. Livingston, for the appellant.

Edward C. Crow, attorney general, and Sam B. Jeffries, assistant attorney general, for the state.

189 SHERWOOD, J. Indicted for murder in the first degree for killing one R. H. Morgan with a shotgun on the 17th of April, 1896, defendant, being put upon his trial, was found guilty of the second degree of that offense, and his punishment assessed at fourteen years in the penitentiary.

This homicide grows out of a disputed line, and a portion of a disputed rock fence, which, if removed, would open defendant's field and leave it uninclosed, and, besides, would admit the water from the hillside to sweep over defendant's field. A lane running north and south divided the two fences of defendant

and of Hammond, that of defendant lying on the west and Hammond's on the east of that lane which, at its north end, opened into a public road which at this point ¹⁹⁰ ran west on the north side of defendant's field. The north end of the lane terminated at the foot of a steep hill, which was the watershed of that immediate locality. The disputed boundary and rock lay between the northeast and the northwest corners of the respective fields. Hammond had lived on his farm about nineteen years, and had never, so far as it appears, had any difference or difficulty with his vis-a-vis neighbor.

Defendant, forty-five years of age, had lived on his farm some fifteen years, in the county some thirty years, had been constable and justice of the peace some ten or twelve years, and bore an excellent reputation for being a peaceable and law-abiding citizen. On the other hand, Morgan, who had lived on the farm of Hammond, his stepfather, for about the space of a year and had rented it, it seems, for the year 1896, had the reputation, as some of the testimony tends to show, of being of a rash, quarrelsome, turbulent, and dangerous disposition, of which defendant was informed prior to the fatal occurrence, and he had been warned by some of his neighbors to be on his guard against Morgan. Indeed, it seems Morgan had conceived a strong dislike against defendant, and had made serious threats against him, and of these threats defendant had been told. About two weeks before the homicide, Morgan had gotten into an altercation with defendant's youngest son; had thrown rocks at him, and, when remonstrated with by defendant on that occasion, had invited defendant out of his field in order to beat him, saying to the latter that he had it laid up for him and intended to do him up.

Morgan was a large stout man weighing one hundred and seventy-five to one hundred and ninety pounds, and was about thirty-eight years old. Defendant had been prosecuted for obstructing the public road at the northeast corner of his field, and was convicted of that offense. On termination of this prosecution, defendant, under the direction of the prosecuting attorney and sheriff as to where his fence should be ¹⁹¹ erected, had set his fence back on his line as it was ascertained to be on the trial aforesaid, and he built this portion of the fence of rock in order to prevent his field from being flooded. After this building of his fence back on his line, defendant was repeatedly annoyed by Morgan throwing this fence down, when defendant would rebuild it. This process of rebuilding had just been com-

pleted just after noon of the day of the homicide, by defendant and two or three of his nearest neighbors. In the afternoon, a passing neighbor, having informed Morgan, who was at work in his field plowing, of the fence being replaced, he immediately quit his work, sent his team around by the bottom road, went by his house for his ax and pistol, and with Hammond, his stepfather, and Mrs. Hammond, his mother, he went to where the rock wall had been replaced, taking with him two chains. The others of the family, two grown women, and two boys, one twelve years and the other younger, all went to what was termed the "rock pile," as the rock wall at the locus in quo was called. Arriving there, they all went to work tearing down defendant's fence and placing the rock thus obtained on that of Hammond. Defendant was in his field cutting sprouts; his son who was in the field also and plowing, but somewhat nearer to the rock wall than his father, saw Morgan and called his father's attention to it, whereupon defendant, looking up, saw Morgan coming down the hill toward the rock wall, at a brisk walk or run. He had on his arm an ax, and defendant thought he saw him have also a pistol. Behind Morgan were his stepfather and mother. Defendant also noticed the others of the party proceeding to the same point with horses, et cetera. Thinking it prudent to do so, defendant went to his house and got a shotgun and returned to the field and went toward where Morgan and the others were tearing defendant's fence down, and when defendant got within about thirty steps of him where they were tearing the fence down, Morgan said to him: "Don't come any closer." Defendant told him to go ¹⁹² away and not to disturb his fence, when Morgan replied with foul and abusive language.

Whether defendant had his gun presented at Morgan at the time or not is the subject of conflicting evidence. Some of the testimony shows it was thus carried; other that defendant merely carried it in his hands, and other still, that it was on his shoulder. After testifying as above stated, with regard to what Morgan said to him, defendant continued: "I kept insisting that Morgan get away, that I didn't want any trouble with him, and that that was my fence, and he very well knew the court had so decided, and if he thought it wasn't to go into court, and when the court decided it was his, he should have it, and not until then. He kept on abusing me, and then he had a pistol, the first I saw of it he was behind the wall from me, and he kind o' scooted down by the side of the tree, and I could just see the pistol and a little side of his face, and when he did

that I turned and walked a few steps right around toward the lane; I was out from the lane a little ways, and about that time his mother came out and commenced quarreling at me, and I said to the old lady, 'I didn't come over here to quarrel with women, it would look better if you were at the house.' I told her I didn't come to quarrel with the old lady, and it would look better if she was at the house, and I happened to think of myself again, that it was, perhaps, done to draw my attention, and when I noticed Morgan again he was up and a few feet from the tree, and I says again 'Go away and don't tear my fence down, and don't abuse me any more. I mean what I say.' I don't think I can repeat the language exactly that I used, and he stooped down and threw some rock from the wall and whirled around in that position (indicating), and that was the time the gun, I guess, fired very quickly. I was a southwest direction from Mr. Morgan, and he reached over just in this position and jerked some rock on, and as he raised up he threw himself in that position, and I thought he was going to draw his pistol, then I ¹⁹³ fired. I thought he was going to draw his pistol. He was not over four or five feet from where he presented the pistol at me."

There was other testimony tending to show that defendant threatened to shoot Morgan in case he did not quit removing the rock, and that Morgan had his team attached to a stone and had just started to drive the team off, when defendant fired; that the exact words used by defendant to Morgan at that moment, were: "Damn you, if you move that I will shoot you," and Morgan answered: "You kiss my a—, you cowardly son of a b—," and started his team, and that witness did not see Morgan have a pistol. The testimony of some of the witnesses corroborates that of defendant, and that of others is of a contrary effect.

The above statement affords a sufficient outline of the evidence to enable the law to be correctly applied to the facts thus recited. Proper instructions were given on the questions of murder in the first and second degrees, and they followed the usual formula. If defendant killed Morgan with express malice, he would be guilty of murder in the first degree, but this remark is, however, to be qualified by this observation, that even if defendant did kill Morgan with express malice, yet if he did so in his necessary self-defense, it would not be murder though defendant bore express malice: *State v. Rapp*, 142 Mo. 447, 448.

Relative to the question of self-defense, instruction 17 exhibits the insignia of that heresy which has so warped "the first law of nature" in this state that the original commentator thereon would not know that subject were he to encounter it in his pathway. In the first place, it is not generally true that "the right of self-defense does not imply the right of attack." This is something which depends upon the circumstances of each individual case. A person about to be attacked is not bound to wait until his adversary gets "the drop ¹⁹⁴ on him" or "draws a bead on him," to use familiar but significant expressions, before he takes steps to prevent those occurrences from taking place.

As was aptly said by Wagner, J., in *State v. Sloan*, 47 Mo. 612: "When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false, and there was, in fact, neither design to do him serious injury nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false which would be innocence had they proved true."

Nor is it true that a party who expects to be attacked has no right "to put himself in the way of being assaulted," et cetera. So long as defendant did no overt act toward Morgan, he had a perfect right to go where he would, and the expectation of being assaulted cuts no figure in the case: *State v. Evans*, 124 Mo. 410, 411.

Besides, defendant was on his own terra firma, and, being there, had the right to repel with force the removal of his fence, as this was a forcible trespass, and an invasion of his property rights. But he had no right to kill Morgan because the latter tore down his fence, or carried it off, and his act in killing Morgan, unless done on the ground of self-defense, was not justifiable or excusable, but still it was not murder unless done with express malice.

On this subject Hawkins says: "Neither can a man justify the killing another in defense of his house or goods, or even of his person, from a bare private trespass; and therefore he that

kills another, who claiming a title to his house, ¹⁹⁵ attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he is forbidden, is guilty of manslaughter": 1 Hawkins' Pleas of the Crown, 6th ed., c. 28, sec. 23, p. 108.

And certainly the same rule would apply to tearing down a rock fence as would apply to breaking a hedge. Wharton says: "We may here repeat that it is murder for A to deliberately kill B for merely trespassing on A's property, A at the time knowing that only a mere trespass was intended. The same rule applies, mutatis mutandis, to the vindication of the right to personal property. If the killing of the trespasser in either case take place in the passion and heat of blood, the killing is manslaughter, but, unless it be in resisting robbery, it is not justifiable. . . . On the other hand, when the defendant was not himself the aggressor, but was defending his own property from an assailant, he has a right to use as much force as is necessary to prevent its forcible illegal removal, or his exclusion from its use. It is true that when the wrong is slight, or can be otherwise prevented or redressed, a cool and deliberate killing of a trespasser is murder. But the question is mainly, Is an essential right of the party forcibly assailed? If so, he is entitled, in the absence of adequate legal remedy, to use such force as is necessary to repel the attack": 1 Wharton's Criminal Law, 9th ed., secs. 500, 501.

These remarks of the learned author are fully supported by the case of *People v. Dann*, 53 Mich. 490, 51 Am. Rep. 151. In that case, an attempt was made to seize wheat, in the defendant's custody; he resisted the attempted seizure and emphasized that resistance with a loaded pistol. Being convicted of an assault with intent to murder Wilson, who attempted to seize the wheat and who also had a pistol, he appealed to the supreme court, and that court said: "Defendant was the owner and in possession of the farm, and Mrs. Layman of the wheat, and he acted for her in caring for it, and he ¹⁹⁶ had a right to defend this property against the encroachments by Wilson, and use so much force as was necessary for that purpose. It needs no citation of authorities to maintain this elementary principle of the law. A man is not obliged to abandon his farm, his home, or his goods to a trespasser or intruder unless he voluntarily chooses so to do. . . . It further appears that, having this right to protect the property, the defendant, while in his efforts to assert and maintain it, was confronted by a concealed

weapon used by Wilson against him, and in making his defense against this attack used his own pistol. This he had the right to do if he feared, and had good cause to fear, his life was in danger. . . . Upon the people's own showing in this case, had death resulted, the defendant would have been guilty of no more than manslaughter, and, under all the circumstances, a new trial would be unnecessary. The judgment of conviction must be reversed and the respondent discharged": See, also, 1 Wharton's Criminal Law, sec. 100; Commonwealth v. Kennard, 8 Pick. 133; Commonwealth v. Power, 7 Met. 596, 41 Am. Dec. 465; Beard v. United States, 158 U. S. 550; 1 Hale's Pleas of the Crown, 485, 486; People v. Payne, 8 Cal. 341.

Bishop, when speaking of cases represented by Commonwealth v. Drew, 4 Mass. 391, says: "The doctrine that passion excited by trespass to property can never reduce the killing with a deadly weapon to manslaughter is too hard for human nature; and, though stated many times in the books, is not sufficiently founded in actual adjudication to be received without further examination. For surely, though a man is not so quickly excited by an attack on his property as on his person, and therefore the two cases are not on precisely the same foundation, yet, since he has the right to defend his property by all means short of taking human life, if in the heat of passion arising in a lawful defense he seizes a deadly weapon, and with it unfortunately kills the aggressor, every principle which in other cases dictates the reduction of the crime to the mitigated ¹⁰⁷ form requires the same in this case": 2 Bishop's New Criminal Law, note, sec. 706.

From these premises it should be concluded that instructions 15 and 23 given of the court's own motion were erroneous. They are the following: "15. Although you may believe from the evidence that deceased was removing a stone fence belonging to defendant at the time he was shot, that would not justify or excuse him" (defendant). "23. The defendant had a right to arm himself and go to any part of his own premises and forbid trespass thereon, but, as before instructed, had no right to shoot deceased merely for removing stone defendant claimed to be his or on his premises."

The error in these instructions consists in this: That they do not go far enough and are therefore to that extent erroneous and misleading. Because while it was true that defendant was not excused or justified in shooting Morgan for taking away stone which inclosed defendant's field or which belonged to defendant,

and were used by him to prevent his field from being flooded, yet it was also true that if hot blood was engendered in defendant by seeing his fence or wall thus removed, he was not guilty of a higher grade of offense than manslaughter in the fourth degree; and these instructions should have been enlarged so as to embrace that point. And it is not the law that self-defense may not coexist with a right to have an instruction given, based upon manslaughter in the fourth degree.

Therefore judgment reversed and cause remanded.

All concur.

HOMICIDE—SELF-DEFENSE—RETREAT—RIGHT OF ATTACK.—Where a person, being himself without fault, reasonably apprehends death or serious bodily harm to himself, unless he kills his assailant, the killing is justifiable: Note to State v. Robertson, 69 Am. St. Rep. 395; People v. Lewis, 117 Cal. 186, 59 Am. St. Rep. 167; for he is not, in such a case, bound to retreat: High v. State, 26 Tex. App. 545, 8 Am. St. 488. He may act according to the surrounding circumstances as they appear to him, though it may turn out that they are deceptive, and that, in reality, his life or person was in no danger at the time: Pinder v. State, 27 Fla. 370, 26 Am. St. Rep. 75; Smith v. State, 59 Ark. 132, 43 Am. St. Rep. 20. In most jurisdictions, however, to sustain a plea of self-defense in case of homicide, there must be shown a pressing necessity, real or apparent, to protect the life of the defendant, or his person, from great bodily harm. He must not be the aggressor, and he must retreat from the combat if there is a mode of escape consistent with his safety: Notes to State v. Robertson, 69 Am. St. Rep. 394; Sullivan v. State, 48 Am. St. Rep. 28.

HOMICIDE ON ONE'S OWN PREMISES—RESISTING TRESPASS—RETREAT.—A homicide committed in defense of habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either, is justifiable homicide: Powell v. State, 101 Ga. 9, 65 Am. St. Rep. 277; but the killing of a person, with a deadly weapon, while he is merely trespassing upon property, is murder: Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93. Compare Tiffany v. Commonwealth, 121 Pa. St. 165, 6 Am. St. Rep. 775. A person attacked in his own domicile is not bound to retreat to avoid killing his adversary: Karr v. State, 100 Ala. 4, 46 Am. St. Rep. 17. So, one attacked on his own premises is not obliged to retreat, but may stand his ground: People v. Lewis, 117 Cal. 186, 59 Am. St. Rep. 167; State v. Cushing, 14 Wash. 527, 53 Am. St. Rep. 883. Compare Lee v. State, 92 Ala. 15, 25 Am. St. Rep. 17.

HOMICIDE—HEAT OF PASSION—MANSLAUGHTER—TRESPASS.—Sudden provocation, acted on in the heat of passion produced thereby, may reduce a homicide to manslaughter: Holmes v. State, 88 Ala. 26, 16 Am. St. Rep. 17; note to High v. State, 8 Am. St. Rep. 497; Anthony v. State, Meigs, 265, 33 Am. Dec. 143; State v. Roberts, 1 Hawks, 349, 9 Am. Dec. 643. But trespass is not such a provocation as entitles one to use a deadly weapon, or reduces a killing below the degree of murder: Note to Tiffany v. Commonwealth, 6 Am. St. Rep. 781.

PRATT v. CONWAY.

[148 MISSOURI, 291.]

SURETYSHIP—GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—CREATION OF RELATION OF PRINCIPAL AND SURETY.—When a grantee accepts a deed with a clause reciting that he assumes to pay a debt secured by mortgage on the property so conveyed to him, he becomes directly liable to the holder and owner of the debt, and the relation of principal and surety thereafter exists between the grantee and the mortgagor, or principal debtor.

SURETYSHIP—GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—DISCHARGE OF SURETY BY EXTENDING TIME OF PAYMENT—NOTICE—EFFECT OF.—If a grantee assumes the payment of a mortgage debt on the property conveyed, thus making the relation of the grantee and grantor or mortgagor toward the mortgagee that of principal and surety, any valid agreement between the mortgagee, where he has notice of the assumption of the debt, and the grantee, to extend the time of payment, without the consent of the surety or mortgagor, will discharge the latter, and a clause in the deed, reciting that the grantee assumes to pay the debt, is notice of the change of liability.

SURETYSHIP—GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—DISCHARGE OF SURETY BY EXTENDING TIME OF PAYMENT—WANT OF NOTICE—EFFECT OF.—Although a grantee assumes the payment of a mortgage debt on the property conveyed, thus making the relation of the grantee and grantor or mortgagor toward the mortgagee that of principal and surety, an extension of the time of payment, made by the mortgagee, does not discharge the mortgagor from his liability as surety, where there is no recital in the deed of such assumption of the debt, and the mortgagee has no knowledge or notice that the grantee agreed to assume it.

SURETYSHIP—GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—DISCHARGE OF SURETY BY EXTENDING TIME OF PAYMENT—PLEADING.—If a grantee has assumed the payment of a mortgage debt on the property conveyed, thus making the grantee a principal, and the grantor or mortgagor a surety, with respect to the mortgagee, the mortgagor, to secure a discharge as surety, by reason of an extension of time of payment given by the holder of the debt, must plead the assumption of the debt by the grantee, and that the extension was made by the mortgagee with knowledge of the fact of such suretyship.

TRIAL—OPENING STATEMENTS—ADMISSIONS PRECLUDING RECOVERY—PRACTICE.—When counsel, in their opening statements, declare or admit facts the existence of which precludes a recovery by their clients, the court may close the case at once, and give judgment against the clients.

INSTRUCTIONS—FACTS ADMITTED IN OPENING STATEMENTS.—Instructions may be shaped in accordance with facts conceded or admitted by counsel in their opening statements.

EVIDENCE—ADMISSIONS—OPENING STATEMENTS.—A defendant is bound by his counsel's admission, in his opening statement, that the plaintiff is the owner of the note on which suit is brought.

EVIDENCE.—A CERTIFIED COPY OF A DEED IS ADMISSIBLE in evidence upon proof of the loss of the original.

Lathrop, Morrow and Fox & Moore, for the plaintiff in error.

Teasdale, Ingraham & Cowherd, for the defendant in error.

293 GANTT, P. J. This is an action on a promissory note for one thousand dollars.

The cause has been certified to this court by the Kansas City court of appeals, because in the opinion of that court there is a conflict between its opinion and a prior decision of the St. Louis court of appeals.

294 The action was against Thomas Conway and Bridget T. Conway, his wife. At the trial plaintiff dismissed as to Mrs. Conway. Plaintiff recovered a verdict and judgment in the circuit court, but the court, on a motion for a new trial, set aside the verdict and granted a new trial, and this is assigned as error.

The facts are as follows: In 1887 Thomas Conway was the owner of certain property in Kansas City, Missouri, and he, together with his wife, executed a deed of trust upon said property to secure the payment of the thousand dollar note in controversy. He afterward made a written contract of sale of said property with one Coburn, the consideration being fifteen thousand dollars. A few days after the said contract was signed, the said Coburn, in turn, effected a sale of the property to one W. B. Grimes, and the contract of sale was transferred to Mr. Grimes, and deed was made by Thomas Conway and wife to W. B. Grimes, in which no mention is made of the one thousand dollar note in controversy.

It is claimed by the defendants that the contract of sale between defendant Conway and Mr. Coburn recited that the grantee assumed and agreed to pay the note in controversy. In the deed from Conway to Grimes the grantee did not assume the one thousand dollar note in controversy. The evidence tended to show that, while Mr. Grimes was the owner of the property in controversy, he secured an extension of the note herein sued on, by paying the holder of said note the sum of twenty dollars commission.

There is no testimony in the case that the holder of the note, at the time the extension was made, knew, or had reason to believe, that any person had assumed and agreed to pay the debt in controversy, or that there was any person obligated to pay said debt other than the maker of the note, Mr. Conway. There

is no allegation in the answer that the holder of the note, at the time the extension was made, knew, ²⁹⁵ or had reason to believe, that anyone except Conway was liable upon the note in controversy. It was claimed at the trial that the maker of the note, Mr. Conway, was released by the extension of the note sued upon, made at the time when Grimes was the owner of the property. This proposition is denied by the plaintiff, and the question before the court for determination is whether, under the pleadings in this case, and under the facts as developed at the trial the extension of the note, made while Grimes was the owner of the property, had the effect of releasing the defendant Conway from his liability thereon.

Plaintiff contends under the undisputed facts in the case there was no release of the defendant Conway, and that he remains liable upon the note sued upon. It was claimed by defendant that the plaintiff did not, at the trial, prove the ownership of the note to be in the plaintiff. Plaintiff insists that the ownership of the note by plaintiff was admitted by counsel for defendant and was a conceded fact throughout the trial.

1. The doctrine that when mortgaged property is sold and the vendee assumes the payment of the mortgaged debt, the mortgagor's obligation as principal debtor is, as between him and such vendee, changed to that of surety, as asserted by defendant, is not controverted by plaintiff, but plaintiff vigorously attacks the position that the mortgagee is affected by such a change unless he consents to accept the vendee as his principal debtor. The general rule of law is, that a creditor cannot be compelled to accept any other person as his debtor, than the one he chooses.

In *Shepherd v. May*, 115 U. S. 505, the supreme court of the United States held that where a vendee expressly promised to pay the mortgage debt, that alone, without the assent of the mortgagee, did not change the mortgagor into ²⁹⁶ a surety merely: *Cucullu v. Hernandez*, 103 U. S. 105; *Rey v. Simpson*, 22 How. 341.

That court reasserted this rule in *Keller v. Ashford*, 133 U. S. 625, saying: "Such an agreement (sale of mortgaged premises and assumption of debt by vendee) does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety toward the mortgagee, so that the latter, by giving time to the grantee, may discharge the mortgagor."

These decisions were subsequently explained in *Union Mutual*

Life Ins. Co. v. Hanford, 143 U. S. 187, where it was said that it is the settled law of that court that the grantee is not directly liable to the mortgagee at law or in equity, and the mortgagee's only remedy was by bill in equity in the right of the mortgagor to avail himself of the security. It was further held that whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity in right of the mortgagor, must be determined by the law of the place where the suit is brought. And as it appeared in that case that by the law of Illinois, where that case originated, as in other states, the mortgagee might sue at law the grantee who, by absolute conveyance, assumes the mortgage debt, it was held that as soon as the mortgagee had notice of the agreement of the grantee, the grantee became directly and primarily liable to the mortgagee and the relation of grantor and grantee was not only changed as between themselves, but as to the mortgagee, and thenceforth that of principal and surety existed as to all three, and any subsequent agreement of the mortgagee with the vendee, without the assent of the mortgagor, extending the time of payment, discharged the grantor: *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Bank v. Waterman*, 134 Ill. 461.

The law is settled in this court that when a grantee accepts a deed with a clause reciting that he assumes to pay a debt secured by mortgage on the property so conveyed ²⁹⁷ to him, he becomes directly liable to the holder and owner of the debt, and that the relation of principal and surety thereafter exists between the grantee and the mortgagor or original debtor: *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685; *Fitzgerald v. Barker*, 85 Mo. 13; *Orrick v. Durham*, 79 Mo. 174.

Any valid agreement by the mortgagee, with notice of this assumption of the debt, with the grantee to extend the time of payment without consent of the mortgagor, discharged the latter: *Wayman v. Jones*, 58 Mo. App. 313.

So that the decisions of this court are entirely in harmony with the reasoning of the supreme court of the United States, it being conceded by that court that, if the law of the former permits a suit at law by the mortgagee against the grantee, the consequence must follow that the relation becomes one of principal and surety.

But in all the cases heretofore decided by this court holding that the assumption of the debt by the vendee or grantee constituted him the principal debtor, and the mortgagor his surety,

the assumption of the mortgage has been a clause in the recorded deed itself whereby notice of the change of liability was conveyed or the fact of notice was conceded. Now, in this case, W. B. Grimes, the grantee, did not assume this note in suit in the deed which he received, and there is no evidence that the holder of this note had any knowledge of such assumption. As the assumption of the debt produced the change of relation between the maker of the note and the grantee to that of principal and surety, and, as the deed contained no evidence of that assumption, it would seem, upon well-settled principles, that notice must be brought home to the holder of the mortgage note before he can be charged with having violated the right of the maker of the note as a surety by extending the time of payment.

We hold that, under the facts of this case, it was essential that defendant should have pleaded the assumption of ²⁹⁸ the debt by Grimes, and that the extension was made with a knowledge of the fact of such suretyship on the part of the holder of the note, and the evidence should have sustained such a plea. The authorities amply support this proposition: *Tharp v. Parker*, 86 Ind. 102; *Agnew v. Merritt*, 10 Minn. 308; *Roberts v. Bane*, 32 Tex. 385; *Kaighn v. Fuller*, 14 N. J. Eq. 419.

Brandt on Suretyship and Guaranty, section 375, tersely states the doctrine thus: "Where the fact of suretyship does not appear from the obligation, but the creditor, when he grants an extension of time to the principal, knows of such suretyship, the surety is discharged the same as if the fact of suretyship appeared from the obligation. But if the fact of suretyship does not appear from the obligation, and the creditor does not know of it when he grants the extension, the surety is not thereby discharged."

2. It is urged now by defendant that there was no proof that plaintiff was the owner of the note. There was a written indorsement on the note: "Pay O. W. Pratt or order without recourse. Amelia Steen." Counsel for defendant made a statement to the jury at the commencement of the trial. Among other things, he said to the jury: "It is true that this action has been pending some time, and at one time we did offer to pay this money to Mr. Pratt, he having acquired title apparently to this note, if he would assign it to us. Of course, the owner of this note has a right under the deed of trust to sell out this lot which secures the payment of the note, and we said to Mr. Pratt shortly after he brought this suit, 'Assign that note to us,

and we will raise the money; assign the note to us and we will sell out that property, Mr. Hyde's property.' They said, 'No, we will not do that.' " Now this was not a statement of what counsel expected to prove, but counsel assured the jury these were facts.

If they were, then there was an unequivocal admission that Pratt, the plaintiff, was the record owner of the ²⁰⁰ note sued on, or, at least, the note had been assigned to him for collection, whereas Hyde was the real owner. If counsel is to be bound by these statements solemnly made in the presence of the court, jury, and opposite counsel, his objection now to the failure of proof of right to sue must fall. He earnestly insists that he is not.

Courts are warranted in acting upon the admissions of counsel in the trial of a cause. They are officers of the court, and represent their clients, and their admissions thus made bind their principals.

It has been ruled again and again that where counsel in their opening statements state or admit facts, the existence of which precludes a recovery by their clients, the courts may close the case at once, and give judgment against the clients: *Oscanyan v. Arms Co.*, 103 U. S. 261; *Liverpool etc. S. S. Co. v. Emigration Commrs.*, 113 U. S. 37; *Butler v. National Home*, 144 U. S. 65; *Abbott's Trial Brief* (civil), 40; *Rice on Evidence*, 128; *Lindley v. Atchison etc. R. R. Co.*, 47 Kan. 432.

There is another view to take of this admission. Where a cause is so conducted that the court and counsel may rightly and do infer that certain facts are conceded or admitted, the court may so treat them for the purpose of the instructions.

A very extreme case is found in our own decisions: *Walsh v. Missouri Pac. Ry. Co.*, 102 Mo. 588. We do not think it necessary to go as far as that decision goes, but it seems to us that, taking these admissions of counsel and the evidence, it can be justly assumed that the legal title to this note was conceded to be in plaintiff, and that fact cannot now be controverted. A written indorsement to plaintiff was proved, and the answer itself alleges a delivery to plaintiff. Pratt, the plaintiff, was a witness, and no effort was made to prove by him that he was not the owner, and no other evidence was offered to impeach his title to it. *Russ v. Wabash etc. Ry. Co.*, 112 Mo. 45, does not militate in the least against these views.

³⁰⁰ The proof of the loss of the original deed was sufficient to admit the certified copy and no error occurred in that respect.

Under this state of the pleadings and the evidence, the court instructed the jury to find for the plaintiff and the jury so found. Afterward, the court granted a new trial, but the record nowhere discloses the ground.

Having gone patiently through the whole record, and found no error in the rulings of the court on the trial, we think it erred in granting a new trial, and its judgment is reversed with directions to enter judgment on the verdict of the jury.

Sherwood and Burgess, JJ., concur.

SURETYSHIP—GRANTEE'S ASSUMPTION OF MORTGAGE DEBT.—A grantee who covenants with the grantor to pay off a mortgage on the premises becomes, in equity, the principal debtor with respect to the mortgage debt, and the grantor becomes his surety: *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, and note; *Abell v. Coons*, 7 Cal. 105, 68 Am. Dec. 229; *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731. Compare *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431. This subject is discussed in the extended notes to *Klapworth v. Dressler*, 78 Am. Dec. 72-90; *Meech v. Ensign*, 44 Am. Rep. 232. But this relation of suretyship does not exist as to the mortgagee unless he has notice of the agreement. If, however, he has such notice, though he may treat both the purchaser and the vendor or mortgagor as debtors, and enforce the liability against either, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all his subsequent dealings with the parties. Hence, an extension, by the mortgagee, of the time of payment of the mortgage, without the mortgagor's consent, releases the grantor from personal liability: *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, and note; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731.

EVIDENCE.—A CERTIFIED COPY OF A DEED is admissible in evidence where the original is lost and cannot be found, or where it is not in the power of the party offering the copy to produce the original: *Note to Kleimann v. Gieselmann*, 35 Am. St. Rep. 767.

MIDLAND NATIONAL BANK v. BRIGHTWELL.

[148 MISSOURI, 358.]

BANKS—COLLECTIONS—PRINCIPAL AND AGENT—DEBTOR AND CREDITOR.—When a note or draft is sent by one individual or bank to another for collection, and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of debtor and creditor.

BANKS—COLLECTIONS—DUTY AS TO—PAYMENT.—As a collecting agent, it is the duty of a bank which receives a note or draft for collection to present it for payment, and, unless otherwise specially authorized, to receive in payment nothing but money, or that which, by common consent, is considered and treated as money.

BANKS—COLLECTIONS—PROVISIONAL CREDIT ON BOOKS—CANCELLATION THEREOF.—A bank which receives a note or draft for collection does not owe the amount thereof to the sender until collected, and, though it may enter a credit therefor in its books, the bank may treat such credit as provisional, and cancel it if the paper is afterward dishonored.

ASSIGNMENT FOR BENEFIT OF CREDITORS—STATUS OF ASSIGNEE—FIDUCIARY RELATION.—An assignee for the benefit of creditors takes no higher or better right to the assigned assets than his assignor possessed, and, if the assignor stands in a fiduciary relation to the assets, that relation is cast upon the assignee.

EQUITY—FOLLOWING TRUST FUNDS.—Equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified.

BANKS—INSOLVENCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUST FUND AS A PREFERRED CLAIM.—The general assets of an insolvent bank having been enlarged and increased by the unlawful conversion of a trust fund, the bailor or cestui que trust is entitled pro tanto to have the amount of the converted fund declared and enforced as a preferred demand against the assigned estate of the bank over the claims of general creditors.

BANKS—INSOLVENCY—RIGHTS OF GENERAL CREDITORS—TRUST FUND.—The creditors of an insolvent banking corporation are entitled to subject its estate to their demands, but justice and equity give them no right to appropriate the estate of another, which it holds in trust.

BANKS—INSOLVENCY—INCREASE OF ASSETS—WHAT IS NOT.—When courts speak of assets being increased by the reception of a trust fund, they mean actual assets. The mere canceling of a liability to one debtor and the transferring of it to another, on the same books of an insolvent bank, is not an actual increase of assets.

BANKS—INSOLVENCY—COLLECTIONS ARE NOT A TRUST FUND, WHEN—PREFERENCE DENIED.—If one bank sends drafts to another bank for collection, which is made by charging the accounts of depositors against whom the drafts are drawn, with their consent, and remitting its own draft, which is not paid, the sending bank, upon the insolvency of the collecting bank, is not entitled to be preferred over other creditors, for the assets of the collecting bank have not been augmented or increased by the collection items, though its liability to depositors has been decreased to the amount of the drafts by the method of collection adopted.

Leslie Orear, A. F. Rector, and Robert M. Reynolds, for the appellant.

Lathrop, Morrow, Fox & Moore, for the respondent.

362 **GANTT, P. J.** This cause was heard and decided by the circuit court of Saline county, on the following agreed statement of facts:

"It is hereby stipulated and agreed by and between the parties hereto that the facts in this case are as follows, and that this agreed statement may be read as evidence in this case. It

is admitted that from and after the twelfth day of December, 1894, and for some time prior thereto, the Midland National Bank was and is now a banking corporation, duly organized under the laws of the United States with reference ³⁶³ to national banks, and doing a general banking business at Kansas City, Missouri. That on December 12, 1894, the Midland National Bank sent collection items to the Slater Savings Bank of Slater, Missouri, with instructions to remit in Kansas City exchange. These items aggregated \$6,726.44, a large part of which consisted of drafts drawn on the Citizens' Stock Bank of Slater, Missouri. All of these items were collected by the Slater Savings Bank, either by charging the accounts of depositors against whom the drafts were drawn, after being authorized to do so by such depositors and crediting the account of the Midland National Bank, or by a clearing of the day's business with the Citizens' Stock Bank. In settlement of the balance for the day against it, the Citizens' Stock Bank gave the Slater Savings Bank its draft on St. Louis for \$4,134.31. The Slater Savings Bank indorsed this draft and forwarded it, together with its own draft on St. Louis for \$2,650, to the Midland National Bank on account of the collection items above mentioned. Neither of these drafts were paid, and both the Slater Savings Bank and the Citizens' Stock Bank of Slater failed December 17, 1894, and their assets are in the hands of their respective assignees. The Midland National Bank has not received payment for any portion of the collection items above mentioned, represented by these drafts for \$4,134.31 and \$2,650. At the time of the failure of the bank, the assignee found in the vault the sum of \$449 in cash. And it is also admitted that said draft of \$2,650 was forwarded to plaintiff on December 14, 1894, and was duly presented for payment on December 17, 1894, when payment was refused, and said draft was protested for nonpayment, and also that the said defendant as assignee had in his hands at the date of the trial sufficient assets to pay the draft of \$2,650 and interest thereon in full." No other evidence was offered at the trial.

³⁶⁴ Thereupon the defendants prayed the court to declare the law to be "that under the agreed statement of facts herein, plaintiff is not entitled to charge the above check of \$2,650 as a trust fund against the Slater Savings Bank, and that the plaintiff is not entitled to a preference in its favor over the general creditors of the Slater Savings Bank, but that the said sum of \$2,650 may be allowed as a general claim against the assets

of said bank in the hands of the defendant as assignee thereof." Which declaration of law the court refused to give and defendant duly excepted to said refusal.

The circuit court then rendered a decree that the said sum of \$2,650 collected by the Slater Savings Bank was received as a trust fund, and was held as such when said bank failed, and that the assignee held it in the same way, and the court further found there were sufficient assets in the hands of the assignee to satisfy said claim and directed it paid with interest. From this decree the assignee appeals to this court.

1. The question involved in this appeal upon the agreed statement of facts is, whether the Midland National Bank is a preferred creditor or a mere general creditor of the Slater Savings Bank. Certain principles must be considered as settled. When a note or draft is sent by one individual or bank to another bank for collection and to remit the proceeds to the sender, the relation of principal and agent is created and not that of creditor and debtor.

The receiving bank's duty as a collecting agent is to present the note or draft for payment, and, unless a special authority is otherwise shown, to receive in payment nothing but money, or that which by common consent is considered and treated as money: *Levi v. National Bank*, 5 Dill. 104; 2 *Morse on Banks and Banking*, sec. 567; *Libby v. Hopkins*, 104 U. S. 370; *People v. City Bank*, 96 N. Y. 32.

Having received the note or draft for collection, it does not owe the amount thereof to the sender until collected, and ³⁶⁵ though it may credit in its books therefor, such a credit may be treated as provisional if the paper is afterward dishonored, and it may cancel the credit: *Armstrong v. National Bank*, 90 Ky. 431.

Equally plain is the law that an assignee for benefit of creditors takes no higher or better right to the assigned assets than his assignor possessed, and, if the assignor stands in a fiduciary relation to the assets, that relation is cast upon the assignee.

It is, moreover, undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified, and this court has extended this doctrine, and held that when a trustee or bailee wrongfully mixed trust money with his own, so that it cannot be distinguished as to what portion is trust money and what part private funds, equity will follow the money by taking out of the estate of the trustee or bailee or his insolvent estate the amount due

the cestui que trust: *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571.

And in *Stoller v. Coates*, 88 Mo. 514, it was held that the general assets of an insolvent bank having been enlarged and increased by the unlawful conversion of a trust fund, the bailor or cestui que trust was entitled pro tanto to have the amount of the converted fund declared and enforced as a preferred demand against the assigned estate. In going to this length, unquestionably this court took a position in advance of the English chancery and most of the states of this Union, but with the soundness of this position we are entirely satisfied. The creditors of an insolvent person or corporation are entitled to subject his estate to their demands, but justice and equity give them no right to appropriate the estate of another which he holds in trust.

With these acknowledged principles as our guide, the question recurs whether, upon the agreed facts of this case, the plaintiff bank has established its claim to a preference.

³⁶⁶ If it can be said that its collection items augmented the assets of the Slater Savings Bank, it would seem that there is no escape from the conclusion that it constituted a trust fund. The contention of the plaintiff is predicated upon this one statement: "It appears that all the items sent for collection on December 12, 1894, were collected by the Slater Savings Bank, partly by charging the accounts of depositors after being authorized to do so by such depositors, and crediting the Midland National Bank therewith. By thus decreasing the liability of the Slater bank to such depositors, the assets of the bank were thereby augmented and increased to the extent of such collection items, which items so collected amounted to much more than \$2,650." Whereas, the assignee insists that this charging the account of one depositor and crediting another is a mere matter of bookkeeping; that not one dollar of money was actually collected by the Slater bank to swell its assets; that by the process resorted to it merely attempted to transfer its indebtedness from certain of its depositors to the Midland bank, and then gave its own exchange, knowing that it had no money to its credit in St. Louis with which it could be honored. The agreed facts fail to show that the Slater Savings Bank had any funds on hand at the time it made this exchange on its books, with which it could have met the checks of the depositors on whom the collections were sent except \$449. In other words, if the Slater Savings Bank had received these collections on

parties who were not its depositors, it is clear it would not have owed the amount thereof to the Midland National Bank until they were collected, and even had it, in anticipation of such collection, credited the Midland bank with the sum thereof, no principle of law or equity would have precluded it from canceling such credit, because, in fact, it had not received the money. In this case, it did not receive any money and there was no augmentation of its assets, and the agreed statement shows no funds on hand at the time of the book ³⁶⁷ entries except \$149, not a dollar of which is shown to have been received from the depositors owing the several collections.

When this court has spoken of assets being increased by the reception of a trust fund heretofore, it clearly meant actual assets, not the mere juggling of accounts, whereby debts due depositors were transferred to become a debt due a correspondent who sent collections. We are not disposed to hold that the mere canceling of a liability to one debtor and the transferring of it to another on the same books is an actual increase of assets.

For these transfers to have such an effect there must have been funds in the bank upon which such transfers could have operated. The transfer of a mere naked liability to one creditor to another on the bank-books added not a dollar to the Slater bank's assets; when the transaction was finished it was a debtor in the same amount, but to a different person, in a different capacity, and had not received an additional dollar whereby the dividends of the other creditors would be enlarged. Upon the argument, we were inclined to the view that plaintiff had probably shown itself entitled to a preference, but, upon more mature consideration, we see no reason why plaintiff should be preferred to other creditors of this bank.

The doctrine invoked rests upon the fact that the trust fund has gone to swell the assets of the insolvent bank, while in this case no inference can be drawn that the assets in the hands of the receiver were the product of the collections sent by plaintiff, but the contrary plainly appears. The bank was hopelessly insolvent, and received not a dollar of new assets.

Justice and equity will only be conserved in this case by distributing the assets *pari passu* and by denying plaintiff the preference it seeks.

The judgment of the circuit court is reversed.

Sherwood and Burgess, JJ., concur.

BANKS—COLLECTIONS—PRINCIPAL AND AGENT—DEBTOR AND CREDITOR—ASSIGNEE IN INSOLVENCY—PAYMENT.—An indorsement “for collection” does not vest title in a collecting bank, but simply constitutes it the agent of the owner: See monographic note to *Allen v. Merchants’ Bank*, 34 Am. Dec. 307, on the liability of a bank as an agent for collection; *National Butchers’ etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515. It does not, as a general rule, vest title to the property in the bank, and if the paper passes into the hands of an assignee in insolvency of the bank, the owner may recover it or its proceeds: *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921. It is the duty of a bank which receives a collection item to present it for payment, and to accept nothing but money, or its equivalent, in payment, unless otherwise specially authorized: Note to *Allen v. Merchants’ Bank*, 34 Am. Dec. 308, 312. The general rule is, that payment must be made in money, where there is no valid agreement to the contrary: Note to *State Bank v. Byrne*, 37 Am. St. Rep. 335; but a collecting bank is entitled to receive in payment overdrafts and certificates of deposit on itself, and thereby to discharge the debtor: *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921.

BANKS—COLLECTIONS—PROVISIONAL CREDIT—CANCELLATION THEREOF.—Merely crediting the amount of a bill, note, or other paper to a depositor before collection is not sufficient to transfer the title so as to make the bank liable for the money at all events, whether collected or not. If, on receiving a check for collection, the amount is credited to the depositor in his pass-book, but it is not paid, the check may be returned and the credit canceled: Note to *Allen v. Merchants’ Bank*, 34 Am. Dec. 308. Compare *National Butchers’ etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515.

ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUST PROPERTY.—AN ASSIGNEE for the benefit of creditors can acquire no better title to a draft or check indorsed to his assignor for collection than the latter had: *National Butchers’ etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515. No property held in trust for others by one who makes an assignment for the benefit of his creditors passes by such assignment, and the beneficiaries of such property are free to assert against the assignee every right and claim which, before the assignment, they could have asserted against the assignor: *Mannix v. Purcell*, 46 Ohio St. 102, 15 Am. St. Rep. 562.

EQUITY—FOLLOWING TRUST FUNDS—PREFERENCE.—A cestui que trust has a right to pursue and recover trust funds, until their identity has been lost, or until they have passed into the hands of a bona fide purchaser, for value, without notice. He may follow them into the hands of an assignee for the benefit of creditors, but when the trust funds, or their proceeds, are no longer traceable, he must come in and share with the general creditors: See notes to *Ferchen v. Arndt*, 46 Am. St. Rep. 608, on the right to follow trust funds; *State v. Midland State Bank*, 66 Am. St. Rep. 486; *State v. Foster*, 63 Am. St. Rep. 60.

BANKS—COLLECTIONS—TRUST FUNDS—DEBTOR AND CREDITOR.—If one bank collects money for another bank, but fails to pay it over, and goes into insolvency, the money, though mingled with the money of the collecting bank, is treated in many cases as a trust fund, and may be recovered from the receiver or assignee in insolvency to the exclusion of general creditors: Note to *Capital Nat. Bank v. Coldwater Nat. Bank*, 59 Am. St. Rep. 577. The relation, however, created by such a transaction between banks is held, in other cases, not to be that of trustee and cestui que trust, but simply

that of debtor and creditor: Notes to Capital Nat. Bank v. Coldwater Nat. Bank, 59 Am. St. Rep. 577; Arbuckle v. Kirkpatrick, 60 Am. St. Rep. 873; Bowman v. First Nat. Bank, 43 Am. St. Rep. 874.

UNION NATIONAL BANK v. HILL.

[148 MISSOURI, 380.]

BANKS—DUTIES OF DIRECTORS AS TO BUSINESS—PRESUMPTION.—The board of directors of a bank are bound to know all that is done by it, as well as the system and rules arranged for its doing; and what they ought to know as to the general course of the bank's business they will be presumed to have known, in a contest between the bank and third persons dealing in good faith with it.

BANKS—DUTIES OF DIRECTORS AS TO SUBORDINATE OFFICERS.—The board of directors of a bank must use ordinary care and diligence to know the conduct of their subordinate officers, as well as what the bank-books show, and to carefully observe the law under which the bank is organized.

BANKS—DIRECTORS—LIABILITY OF, FOR LOSSES THROUGH NEGLIGENCE.—The board of directors of a bank are answerable for losses sustained by it, through the acts of its cashier, in lending moneys not only in excess of the limit prescribed by statute, but to insolvent persons, where they, by the exercise of ordinary care, might have known, and were, therefore, in duty bound to know that this was being done; and it is no excuse for such neglect that they received no benefit from such loans and that their services were gratuitous.

BANKS.—THE ORDINARY CARE REQUIRED OF THE DIRECTORS of a bank in the performance of their duties is such care and diligence as a prudent man exercises in the conduct of his own affairs, in view of all the surrounding circumstances.

BANKS—REMEDIES AGAINST DIRECTORS FOR LOSSES THROUGH NEGLIGENCE.—The board of directors of a bank are answerable for losses to it, sustained by reason of loans made in violation of the statute, as well as to insolvent persons, in an action at law by the corporation while it is a going concern, or by the assignee after an assignment, or, in an action in equity, by the stockholders, in the event of the assignee's declination to bring suit.

BANKS—GROSS NEGLIGENCE OF DIRECTORS—WHAT IS.—The board of directors of a bank are guilty of gross negligence, where they leave the entire management of its business to the cashier.

BANKS—BOARD OF DIRECTORS—INALIENABLE DUTY. Under the statute of Missouri, the management of the affairs and business of a bank devolves upon the board of directors or managers. The functions thus imposed upon them are inalienable, and cannot be conferred upon any officer; and this applies with peculiar force to the making of loans and discounts.

BANKS—MISMANAGEMENT—ACTIONS AGAINST DIRECTORS FOR LOSSES—STOCKHOLDERS—CREDITORS.—AN ASSIGNEE of an insolvent bank can maintain an action against its directors for losses sustained by the bank because of their failure to

exercise ordinary care and diligence in the management of its business, as he, by reason of the assignment, succeeds to all interests and assets of the bank; so, if he refuses to sue, the stockholders, who are the real parties in interest, may maintain an action in their own names, making the corporation a defendant; but, mere creditors of the bank cannot maintain such an action.

BANKS—MISMANAGEMENT — LOSSES—LIABILITY OF DIRECTORS AT SUIT OF CREDITORS.—The mere failure of bank directors to exercise ordinary diligence and care as such, in the management of the business affairs of the bank, by reason of which it becomes insolvent, does not make them answerable at the suit of persons who are merely general creditors of the bank.

Leslie Orear, A. F. Rector, Dan V. Herider, E. S. Herider, F. M. Black, Nathan Frank, C. W. Bates, I. N. Watson, and John W. Beebe, for the appellants.

Thos. Shackelford, Davis & Duggins, John A. Rich, S. B. Burks, W. M. Williams, and Johnson & Lucas, for the respondents.

385 BURGESS, J. On the seventeenth day of October, 1894, the Citizens' Stock Bank of Slater, Missouri, having become insolvent, made an assignment to defendant, Com. P. Storts, for the benefit of its creditors, and the plaintiffs whose demands were allowed by the assignee prosecute this suit against the bank, the assignee, and the administrator of the estate of Joseph Field, deceased, who was cashier, and against Fields' estate and the other defendant directors, upon the alleged ground that the insolvency of the bank was brought about by their neglect and mismanagement. After a demand upon and a refusal by the assignee to institute suit, this suit was brought by plaintiffs. There was judgment for defendants in the trial court, and the case is here on plaintiffs' appeal for review.

The Citizens' Stock Bank was organized under the laws of this state on the first day of September, 1882, with a capital stock of \$30,000. On the seventh day of November, 1887, the capital stock was increased to \$100,000, and the bank made an assignment on December 17, 1894, for the benefit of its creditors.

386 The petition charges the defendants with negligence in failing to take any part in the management of the affairs of the bank, in turning the management of the business thereof over to Joseph Field, the cashier, during the existence of the bank, in making loans to various persons and firms when they were insolvent, and in making to each of certain named persons, firms, and corporations loans in excess of twenty-five per cent of the capital stock of the bank, by reason of all which,

said sums of money so loaned were lost and said bank became insolvent. The plaintiffs sue for themselves and all other persons similarly situated.

The total amount of the assets which came into the hands of the assignee, including real estate, furniture, cash and cash items, sums due from other banks, overdrafts, notes less credits—fifty shares of stock in the St. Louis National Bank (which was held by the Chemical Bank of St. Louis as collateral security and was worth \$5,000), and notes held by other banks and persons as collateral security, at face value amounted to \$673,339.22.

There were also other notes held as collateral by other banks which were not included in the inventory. The claims allowed by the assignee amount to \$554,592.32, aside from \$10,000 or \$12,000 of other unadjusted demands.

The assignee, after diligent effort to collect the money due the bank up to the time of the trial, had only been able to collect some \$45,000 or \$46,000, not including some \$18,000 adjusted by way of offsets, and had paid a dividend of three per cent only. His evidence was to the effect that a very large portion of the notes which came into his possession are worthless, because of the insolvency of the persons liable thereon, and that most of the notes held by other banks and individuals are of no value for like reason.

On the seventh day of November, 1887, the defendant directors increased the stock of the bank from \$30,000 to ³⁸⁷ \$100,000, and in doing so caused an alleged surplus of \$30,000 to be applied in payment of new stock issued to the existing stockholders, when in fact there were no surplus earnings on hand.

At the time the capital stock of the bank was increased, the Mead Mercantile Company was indebted to the bank on notes \$42,155, and overdrafts \$2,261.21, making in all \$44,420.21, which was more than the entire capital stock before the increase and more than twenty-five per cent after the increase. The indebtedness of this company continued to be greatly in excess of twenty-five per cent of the capital stock of the bank up to the date of the assignment, when it amounted to \$84,825.98. Only a small portion of this indebtedness was ever secured.

At the time the capital stock of the bank was increased, the firm of Storts & Eubanks owed the bank \$37,380.99, which was more than its capital stock before the increase, and more than twenty-five per cent after the increase. This indebtedness con-

tinued to increase up to June, 1892, when it amounted to \$117,294, more than the amount of the capital stock. This firm failed in business on the last-named date. For this money the bank never had any security. The members of the firm are the sons of two of the directors of the bank. In addition to the amount owing by this firm, one of its members, W. B. Storts, at the time of the assignment by the bank, owed it on his personal account the sum of \$53,103.52, for borrowed money, from time to time for the last two years next preceding the assignment, for which the bank had no security, and the loss was a total one.

The indebtedness of one Joseph Baker to the bank in June, 1892, exceeded twenty-five per cent of its capital stock and so continued up to the time of the assignment, when it amounted to \$67,709.41. For this indebtedness the bank never had any security.

In addition to the above, the indebtedness of the firm of ~~388~~ B. P. Storts & Company, of which firm Joseph Field, the bank's cashier, was a member, and of Joseph Field, amounted to \$67,979, upon which there was a loss to the bank of not less than \$40,000, to \$50,000.

While the books of the bank show that the notes of these parties were discounted and the proceeds placed to their respective credit, there is nothing on the books in many instances to show when and for what time the discounted notes were renewed. It is the same with respect to many other notes held by other banks as collateral security. Of the \$629,000, and over, of notes shown by the inventory to be in the hands of the assignee and in the hands of other banks and other persons as collateral security, \$307,355.38 do not appear to have gone through the bank, that is to say, they do not appear upon the books of the bank; and \$286,055.85, in notes which were discounted and do not appear by the books to have been paid, are not found in the inventory, either as in the possession of the assignee or in possession of other banks as collateral security. It is probable that in the \$307,355.38 there are renewal notes to the amount of \$286,055.85.

It may be stated that the bank kept no separate account of bills payable. It seems to have been the custom of Field, the cashier, in borrowing money from other banks, to make a note signed by him as cashier, and secure the same by notes held by his bank, but the notes of his bank contain no record of the notes turned over as collateral security. The information as

to notes held by other banks comes from the correspondence turned over to the assignee.

On September 1, 1882, the incorporators of the bank met and adopted the following by-laws:

"1. The officers of this bank shall be a president, vice-president, a secretary, a cashier, and an assistant cashier. The offices of secretary and cashier may both be filled by the same person.

³⁸⁹ "2. The board of directors shall appoint such clerks as they may think necessary, regulate the salaries of all officers and clerks, determine the amount of dividend to be paid, the time and number of payments of dividends, and guard the interests of the bank.

"3. The cashier shall be general manager of the business of the bank, and have supervision over it in all of its details. He shall have full power and authority to create indebtedness against the bank, to sign all issues of indebtedness and make indorsements for the bank and receive and receipt for and pay out money for the bank; to appoint clerks, subject to the confirmation of the board, and prescribe their duties."

Joseph Field was elected cashier of the bank at the time of its organization and continued in that capacity to the time of the assignment. The directors met about once a year, but, having implicit confidence in the integrity and business capacity of the cashier, they paid no attention whatever to the business of the bank, but left it entirely to him. Several of them had large deposits in it at the time it closed its doors.

The defendant, Com. P. Storts, assignee, is a son of the defendant Perry C. Storts, and was clerk in the bank prior to and at the time of the assignment.

There were other losses sustained by the bank which it is not thought necessary to set forth specifically, as those already stated are sufficient to a decision of the case.

The board of directors of a bank have a general superintendence over and the management of all its business affairs and transactions which ordinarily vest with it; and it has been said that, "they are bound to know all that is done, beyond the merest matter of daily routine; and that they are bound to know the system and rules arranged for its doing": Morse on Banks and Banking, 3d ed., sec. 116. And what they ought to know as to the general course of the bank's business they will ³⁹⁰ be presumed to have known, in a contest between the bank and third persons dealing in good faith with it. They must also use ordinary care and diligence to know the conduct of their

subordinate officers, as well as what the bank-books show, and carefully observe the law under which the bank is organized.

The duties of the defendant directors being thus outlined, the questions are, Did they fail to exercise ordinary care in the discharge of their duties by reason of which the bank became insolvent; and, if so, can the plaintiffs, who are only creditors, maintain this action? Of these in their order.

Section 2758 of the Revised Statutes of 1889 provides that: "No corporation organized under this article, or heretofore organized under a general or special law of this state, shall loan its money to any individual, corporation, or company, directly or indirectly, or permit any individual, corporation, or company to become at any time indebted to it in a sum exceeding twenty-five per cent of its capital stock actually paid in or permit a line of loans to any greater amount to any individual or corporation."

The bank not only loaned moneys to the Mead Mercantile Company, Storts & Eubanks, Josiah Baker, and B. P. Storts & Company in excess of twenty-five per cent of its capital stock, thereby violating the statute, but it made many of these loans without security when the parties were insolvent, when, by the exercise of ordinary care—that is, such care and diligence as a prudent man exercises in the conduct of his own affairs in view of all the surrounding circumstances—the board of directors might have known, as it was their duty to know, that the loans were in excess of the limit prescribed by statute, as well, also, as of the insolvency of the parties borrowing: Thompson on Corporations, secs. 4104, 4108; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Briggs v. Spaulding, 141 U. S. 132.

391 In *Martin v. Webb*, 110 U. S. 15, in speaking of the duties of the directors of a bank, it is said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In the case of *Marshall v. Farmers' etc. Sav. Bank*, 85 Va.

678, 17 Am. St. Rep. 84, it was held that bank directors hold to stockholders, depositors, and creditors the relation of trustees to cestui que trust, and as such are personally responsible for frauds and loans resulting from negligence and inattention to their duties, even though they be not guilty of bad faith and are ignorant of the affairs of the bank. The same rule is announced in *Savings Bank v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81; *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592.

Hun v. Cary, 82 N. Y. 71, 37 Am. Rep. 546, was a suit brought by the receiver of a savings bank against directors to recover damages because of misconduct in the management of the affairs of the bank, and Earl, J., in speaking of the duties which the directors owed to the bank and to its depositors, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings ³⁹² bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them."

It would therefore seem that the defendant directors were remiss in the discharge of their duties in not knowing, when it was their duty to know, that loans were being made by the bank in violation of the statute, and to persons in amounts larger than its capital. Indeed, the case made out by plaintiffs is one of the most absolute and unqualified inattention and neglect by the directors.

And, while it is not pretended that they misappropriated any of the funds of the bank, or that they were guilty of any fraudulent conduct, they were guilty of gross neglect in leaving the

entire management of the business of the bank to the cashier. And it is no excuse for the want of diligence to say that they had no benefit from it, and that their services were gratuitous, when, by the exercise of ordinary care, they could have prevented the disastrous consequences which flowed from the want of such care.

The defendant bank was doing business under article 7, chapter 42, of the Revised Statutes of 1889 and by section 2748 of the statutes which is to be found in that article it is provided that the affairs and business of such corporations shall be managed by a board of directors and managers, thus imposing upon them functions which are inalienable, and which they could not confer upon any officer or officers. "Thus the ³⁹³ making of discounts is an inalienable function of the directors. They cannot part with it, or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be subdelegated. The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skillful conduct of which the prosperity of the institution and the safety of persons dealing with it depend. This duty they cannot shift in whole or in part upon others, and it covers no department of banking business more unquestionably than the making of loans and discounts": Morse on Banks and Banking, 3d ed., sec. 117; Gibbons v. Anderson, 80 Fed. Rep. 345; 3 Thompson on Corporations, secs. 4108, 4109; 1 Morawetz on Private Corporations, secs. 552, 556; Sperring's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

The directors having been guilty of negligence in the discharge of their duties, by reason of which losses were sustained by the bank, they were liable in an action at law to the corporation, while a going concern, for losses due to such loans, or to the assignee after the assignment, or in equity to the stockholders, in the event of the declination of the assignee to bring suit.

Thompson v. Greeley, 107 Mo. 577, was an action by the receiver of an insolvent savings bank against its directors, for losses sustained by the bank by reason of its having loaned its moneys in violation of the statute, and it was held that the directors were liable at the suit of the corporation for the losses to the corporate assets thereby sustained: Citing Bent v. Priest, 86 Mo. 482; Slattery v. St. Louis etc. Transfer Co., 91 Mo.

217, 60 Am. Rep. 245; Ward v. Davidson, 89 Mo. 445; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Smith v. Hurd, 12 Met. 371, 46 Am. Dec. 690; Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371; Thompson on Liability of Officers, 376; Cogswell v. Bull, 39 Cal. 320; ³⁹⁴ Franklin Fire Ins. Co. v. Jenkins, 3 Wend. 130; Hun v. Cary, 82 N. Y. 70, 37 Am. Rep. 546; Horn Silver Min. Co. v. Ryan, 42 Minn. 198. It was ruled in that case that a receiver of an insolvent corporation succeeds to the title of the property and rights of action of the corporation, when so invested by statute, or by the decree of the court appointing him, and is the proper party to a suit to enforce them by legal proceedings. It was said: "If a right of action against these directors existed in favor of the corporation, this action is properly prosecuted in the name of the receiver": Alexander v. Relfe, 74 Mo. 516; Gill v. Balis, 72 Mo. 429; High on Receivers, sec. 316; Thompson on Liability of Officers, 377, and authorities cited; Morse on Banks and Banking, sec. 129; Hun v. Cary, 82 N. Y. 70, 37 Am. Rep. 546. If, then, an action can be maintained by a receiver of an insolvent bank against its directors, for losses sustained by the bank because of their failure to exercise ordinary care and diligence in the management of the business of the bank, for like reason an assignee may do so, because, by reason of the assignment, he succeeds to all interests and assets of the bank. So, it has been held that if the assignee refuse to sue, the stockholders, who are the real parties in interest, may maintain an action in their own names, making the corporation a defendant: Brinkerhoff v. Bostwick, 88 N. Y. 52; Greaves v. Gouge, 69 N. Y. 154; Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592; Savings Bank of Louisville v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488.

And shareholders and creditors will be permitted to sue in similar circumstances: Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625; Marshall v. Farmers' etc. Sav. Bank, 85 Va. 676, 17 Am. St. Rep. 84; Halsey v. Ackerman, 38 N. J. Eq. 508; Ackerman v. Halsey, 37 N. J. Eq. 356. In each of these cases, the person or persons suing were either stockholders or stockholders and creditors, and the fact that they were stockholders was chiefly relied upon for a recovery, so that they are not authority for the contention that persons who are creditors only may maintain such an action against the directors of an insolvent bank.

395 *Warner v. Hopkins*, 111 Pa. St. 332, 56 Am. Rep. 266, was an action by the creditors of an insolvent bank against its directors and assignee to charge the directors for losses sustained by the bank by reason of their mismanagement to such an extent as to render it insolvent, and it was held that the action might be maintained. The court said: "Had the creditors the right to file a bill? Of this we entertain no doubt. It was held in *Watt's Appeal*, 78 Pa. St. 370, that the shareholders are entitled to proceed by bill against the directors of a corporation for mismanagement of its affairs: Citing *Spering's Appeal*, 71 Pa. St. 24, 10 Am. Rep. 684, and *Gavenstine's Appeal*, 49 Pa. St. 310. It is settled by numerous cases that the creditors have the same right."

So in *Trustees Mut. Building Fund v. Bosseiux*, 3 Fed. Rep. 817, it was held that the directors of an insolvent corporation might be sued by one or more of its creditors for losses sustained by the bank by reason of their negligence.

In *Foster v. Bank of Abingdon*, 88 Fed. Rep. 604, plaintiffs, who were depositors in the bank of Abingdon, sued the bank and its directors for themselves and all other creditors who might come in and be made parties plaintiff for losses sustained by the bank for reason of their negligence so as to render it insolvent, and upon demurrer to the petition it was held that "the general relation of the bank to a depositor is that of debtor and creditor" (citing *St. Louis v. Johnson*, 5 Dill. 241) and that plaintiffs might maintain the action.

Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81, was a suit by a general depositor in a bank, against its directors, for negligence in permitting it to be held out to the public as solvent, when, in fact, it was at the time insolvent, by reason of which he sustained damages, and it was held that he might prosecute the action: See, also, 3 *Thompson on Corporations*, sec. 4123; *Maisch v. Savings Fund*, 5 Phil. 30.

These decisions all seem to proceed upon the theory that the directors of a banking corporation and its creditors occupy toward each other the relation of trustee and cestui que ³⁹⁶ trust, but we are not prepared to adopt this view. "They are not express trustees; they are agents; they are trustees in the sense that every agent is a trustee for his principal and bound to exercise diligence and good faith": *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625. The relation of the creditors toward the corporation "is that of contract and not of trust": Chief Justice Fuller in *Briggs v. Spaulding*, 141 U. S. 132.

In *Deaderick v. Bank of Commerce*, 100 Tenn. 457, it is held that directors of a corporation are its agents, and the agents of its stockholders, but owe no duty to corporate creditors, and are not liable to such creditors, after insolvency of the corporation, for loss made possible by their neglect to properly supervise the management of its affairs. The court said: "That directors are liable in an action at law to their principal, the corporation, for losses resulting to it from their malfeasance, misfeasance, or their failure or neglect to discharge the duties imposed by their office, and, in equity, to the stockholders for these losses, the corporation declining to bring suit, is clear, upon the authorities. Though the corporation is the legal entity, yet the stockholders are interested in the operations of the corporation while in a state of activity, and, upon its dissolution, in the distribution of its property, after all debts are paid; and so its officers or agents stand in a fiduciary relation to both. But it is otherwise as to creditors. The directors of a going corporation, whether able to pay its debts or not, owe no allegiance to them. It is true that the creditors may extend credit upon the faith that the company has assets to pay its debts, and that these assets are prudently managed; yet they are strangers to the directors; they maintain no fiduciary relation with them; there is a lack of privity between the two. As was said by the supreme court of the United States in *Briggs v. Spaulding*, 141 U. S. 132, the relation between the creditors and the corporation 'is that of contract, and not of trust'; but there is nothing, of either contract or ³⁹⁷ trust, in all ordinary cases, to create any relation between the creditor and the directors. A creditor of a going corporation, being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention, than could the creditor of any other insolvent debtor maintain a suit against his agent under similar circumstances. In such a case as the one we are dealing with, that is, loss to the corporation resulting from mere negligence on the part of its directors, a creditor seeking to hold the directors liable for this loss, even in a suit like this, must rest his claim upon some provision of positive law."

Landis v. Sea Isle City Hotel Co., 53 N. J. Eq. 654, was a proceeding in equity by plaintiff, who was both a stockholder and a creditor of an insolvent corporation, to charge its directors with losses sustained by their mismanagement. The court re-

viewed the cases of *Halsey v. Ackerman*, 38 N. J. Eq. 508, and *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, and held that, in so far as the plaintiff was a stockholder, they were liable to him for losses resulting from their negligence, because of the fiduciary relations existing between them; but, as for losses sustained by him as a mere creditor, they were not liable to him for such negligence, because they did not occupy the relation to him as such creditor, and there was no evidence of diversion by them of the bank funds from their legitimate channel.

In *Frost Mfg. Co. v. Foster*, 76 Iowa, 535, it was held that "the fact that directors of a corporation have mismanaged its business does not render them liable to creditors, unless they are made liable by the provisions of the articles of incorporation or by statute": 3 Thompson on Corporations, sec. 4137.

So, in *Fusz v. Spaunhorst*, 67 Mo. 256, it is held that, in the absence of statutory or constitutional provisions, a ³⁹⁸ director or officer of an insolvent incorporated bank is not individually responsible in an action at law for injury resulting to a creditor or depositor from the management of the bank, unless the injury be occasioned by his intentional or fraudulent act.

Our conclusion is, that the relation of defendant bank to plaintiffs is that of debtor and creditor, and that for the mere failure of the bank directors to exercise ordinary diligence and care as such in the management of the business affairs of the bank, by reason of which the bank became insolvent, they cannot be held responsible at the suit of its general creditors.

We accordingly affirm the judgment.

Gantt, P. J., and Sherwood, J., concur.

BANKS—DUTIES OF DIRECTORS.—Directors are bound to manage the affairs of a bank with the same degree of care and prudence which is generally exercised by business men in their own affairs. They must be diligent and careful in performing the duties they have undertaken, and they cannot excuse any imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and, if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the bank may hold them answerable for the consequences: *Marshall v. Farmers' etc. Sav. Bank*, 85 Va. 676, 17 Am. St. Rep. 84.

BANKS—LIABILITY OF DIRECTORS—ORDINARY CARE.—The directors of a bank must exercise ordinary care and diligence, such as that exercised by prudent men in their own affairs: *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625; and are answerable for losses resulting from mismanagement of its business affairs. They must show reasonable capacity for the position they

accept, and use it in their best discretion and industry, and a scrupulous conscientiousness in every matter, and obey accurately the requisitions of the charter and of the general law: *Marshall v. Farmers' etc. Sav. Bank*, 85 Va. 676, 17 Am. St. Rep. 84, and monographic note thereto on the liability of the directors of a corporation for negligence. A bank director cannot be held as such to the same ordinary care that he takes of his private affairs; and, if he exercises the ordinary care which bank directors usually exercise, he is not liable for a misapplication of the funds of the bank by its officers: *Swentzel v. Penn Bank*, 147 Pa. St. 140, 30 Am. St. Rep. 718.

BANKS—NEGLIGENCE—INTRUSTING BUSINESS TO CASHIER—ORDINARY CARE.—The directors of a bank have no right to commit the management of its affairs to a cashier, president, or other officer, and thereafter take no steps to keep themselves informed of what is being done with the corporate assets, and the property of depositors and others confided to its care; and, if they do so, and money or other property is lost through speculation, misconduct, or reckless extravagance, which reasonable care and attention on their part would have prevented, they are answerable: Note to *Marshall v. Farmers' etc. Sav. Bank*, 17 Am. St. Rep. 96, 100. The active management of a bank may be left to the cashier and other agents selected by the directors, but it is the duty of the directors in respect to such cashier and agents to supervise, direct, and control them: Note to *Swentzel v. Penn Bank*, 30 Am. St. Rep. 725. The directors of a bank are bound by the authorized acts of its cashier: *Davenport v. Stone*, 104 Mich. 521, 53 Am. St. Rep. 467. As to the liability of directors for a dereliction of their cashier, see *Savings Bank v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488. It is criminal negligence for a banker not to know of his own insolvency: *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447.

BANKS—MISMANAGEMENT AND LOSS—ACTIONS AGAINST DIRECTORS FOR.—Suits against the directors of a bank for mismanagement may be brought by the corporation, stockholders, assignee for the benefit of creditors, or a depositing creditor, according to the circumstances of the case: *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625; *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719; *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725.

BANKS—CONDITION OF—KNOWLEDGE OF DIRECTORS—PRESUMPTION.—The directors of a bank are conclusively presumed to know its condition, and they cannot shield themselves from liability because of their ignorance of facts of which it is their official duty to be informed: *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719; monographic note to *Isham v. Post*, 38 Am. St. Rep. 774, on the care required of bankers acting as agents or bailees; note to *Swentzel v. Penn Bank*, 30 Am. St. Rep. 725.

CRAVENS v. NEW YORK LIFE INSURANCE COMPANY.

[148 MISSOURI, 583.]

INSURANCE—LIFE—PLACE OF CONTRACT.—If a contract of insurance is delivered in one state, and the premiums are there paid, upon performance of the conditions precedent that the premiums shall be paid, and that the policy shall be delivered to the insured during his life and good health, the contract is executed in that state, although the insurance company is incorporated under the laws of another state, and has its chief office there; and this is true, although it is expressly agreed in the application and policy that the place of the contract is in such other state, and that the contract shall be construed according to the laws thereof.

INSURANCE COMPANIES — FOREIGN — LIMITATIONS UPON TRANSACTION OF BUSINESS.—Foreign insurance companies which do business in this state do so not by right but by grace, and must, in doing so, conform to its laws. The state may also prescribe conditions upon which it will permit such companies to transact business within its borders, or exclude them altogether, without violating any of their contractual rights.

INSURANCE—CONTRACT OF—LAW GOVERNING, AS TO PLACE.—A contract of insurance, executed in this state, is subject to the laws of this state, notwithstanding any stipulations therein to the contrary.

INSURANCE—STATUTES AS PART OF CONTRACT OF.—If a contract of insurance is executed in this state, the statute in force respecting its subject matter becomes as much a part of the contract as if copied therein.

INSURANCE—CONTRACT OF—WAIVER OF STATUTORY PROVISIONS.—The parties to a contract of insurance cannot, either directly or indirectly, waive the provisions of the statute governing it.

INSURANCE—CONTRACTS WITH FOREIGN COMPANIES—WHAT LAW CONTROLS.—When no statute intervenes prohibiting it, an insurance company doing business, by permission, in another state from that of its incorporation may, by contract, make the law of the state of its incorporation the applicatory law of the contract, but where the laws of the state in which it does business, by license, prohibits such a corporation from making certain kinds of contracts, it is bound by such laws and must conform to them.

INSURANCE—LIFE—TEMPORARY INSURANCE — NON-FORFEITABLE PAID-UP POLICY—APPLICATION OF STATUTES—LIABILITY—WAIVER.—The provisions of the Missouri statute which concern temporary insurance and the amount thereof, as well as the length of time that it shall, in each case, continue; which make policies of insurance nonforfeitable after the payment of two or more full annual premiums thereon; and which declare that, in case of the death of the insured within the term of temporary insurance, to be ascertained as provided by the statute, the company shall be answerable for the full amount of the policy, less the unpaid premiums with interest thereon, apply to a case in which an insurance company has issued its fifteen year endowment policy, where four annual premiums have been paid; where default is made when the next annual payment becomes due in May, and the insured dies in the following November; and where the policy

provides, in case of nonpayment of premiums, for the issuance, upon demand, of a nonforfeitable paid-up policy after the original policy has been in force for three years; but those provisions of the statute concerning the paid-up policy are inapplicable where the insured declines his right to it, and makes no demand therefor. Statutory provisions of exemption from the control of certain statutes are also inapplicable where there is nothing to bring the policy within the exempted matters. Hence, if the insured dies, as in this case he did, within the term of temporary insurance, thus fixed or ascertained by the statute, the amount of the policy, less such unpaid premiums and interest, must be paid, notwithstanding any waiver in the policy by the insured of his statutory rights.

INSURANCE—LIFE—DEMAND FOR PAID-UP POLICY—CONDITION PRECEDENT—WAIVER.—If a policy of life insurance requires a demand to be made for a paid-up policy within six months after default in the payment of premium, such demand, with a surrender of his policy, is a condition precedent to the holder's right to a paid-up policy, and it cannot be waived by the company so as to affect the rights of the insured.

INSURANCE COMPANIES—FOREIGN—STATUTES CONCERNING—CONSTITUTIONALITY.—State laws regulating foreign insurance companies, and prescribing rules by which they may do business within a state, or prohibiting them from doing so altogether, do not contravene any provision of either the state or federal constitution.

William B. C. Brown, James H. Cravens, and Karnes, Holmes & Krauthoff, for the appellant.

F. N. Judson, for the respondent.

590 **BURGESS, J.** This is a suit upon a policy of life insurance for \$10,000, issued by the defendant company upon the life of J. K. Cravens, deceased, in favor of the plaintiff, who was his wife. The case was tried by the court, a jury being waived. There was judgment in favor of plaintiff in the sum of \$2,670, from which, after an unsuccessful motion for a new trial, she appeals, claiming that she is entitled to recover the sum of \$8,749.21, that is, the face of the policy, \$10,000, less the two unpaid premiums which were due at the time of the death of the assured, together with interest thereon.

The petition alleges that the policy was issued on the eleventh day of May, 1887; the payment of all annual premiums, until May, 1891; the death of the assured on November 2, 1892; that under the statute the insurance was extended, and was in force at the date of the death of the assured, and asks judgment for the amount of the policy, less the unpaid premiums.

The answer of defendant alleges that it is a mutual insurance company duly incorporated under the laws of the state of New York, and doing business in this state; that by agreement of the parties the law of that state was made the law governing

the contract; set up that the assured made default in May, 1891, after paying four annual premiums and tendered the sum of \$2,670, the amount of paid up or commuted policy, to which the original policy was entitled by its terms on such default, waiving failure to make demand therefor. It also alleges that other policy-holders, that ⁵⁹¹ is, other members of the same tontine class, had by the terms of their respective policies acquired with plaintiff contingent and mutual interests in the profits and surplus to be derived from the premiums on all policies of such class, and that the company on the faith of plaintiff's contract had incurred obligations to the other members of the tontine class, and that plaintiff is now estopped from setting up any other or different claim under the policy.

The answer further alleges that, if the statute of Missouri, relied on by plaintiff, was construed so as to nullify the nonforfeiting agreement upon the faith of which the policy was issued and without which it would not have been issued, and to create and enforce an obligation contrary to the expressed intent of the parties, then the statute so construed is repugnant to the constitution of Missouri, and to the constitution of the United States.

The application for the policy is made part of the contract and contains the following provisions:

"2. That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its right, unless such statements, representations, or information, be reduced to writing and presented to the officers of the company, at the home office in the application. . . .

"4. That under no circumstances shall the policy hereby applied for be in force until the actual payment to, and acceptance of the premium by the company, or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for. . . .

⁵⁹² "6. That the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole, and in each of its parts and obligations, according to the laws of the state of New York, the place of

the contract being expressly agreed to be the principal office of the said company in the city of New York."

The policy contains this further provision: "That if the premiums are not paid, as hereafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium, paid-up policy will be issued, on demand made within six months after such lapse with the surrender of this policy, under the same conditions as this policy except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premiums shall be made; and all right, claim, or interest arising under statute, or otherwise to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statutes of any state, or not, is hereby expressly waived and relinquished."

The cause was tried upon an agreed statement of facts, the material parts of which are as follows:

"1. That the defendant is a corporation, organized and existing under the laws of the state of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was at the date of issuing the policy in question, and since has been and now is, engaged in the business of insuring lives through branch offices situated in the different states and territories of this country and certain foreign countries.

593 "2. That the defendant for many years past has maintained branch offices in the state of Missouri and has employed agents to solicit applications for insurance from citizens of Missouri, and in the year 1887, as both prior and subsequent thereto, defendant had received from the superintendent of insurance a certificate of authority to transact business in said state.

"3. That during the year 1886 and prior to the issuance of the policy sued upon, the amount of policies issued by defendants to citizens of Missouri was \$1,617,985, and the amount of insurance in force on the lives of citizens of Missouri on December 31, 1886, was \$8,886,542, and the total amount of policies issued by defendant in said year 1886 was \$85,178,294, and the

total amount of policies in force on December 31, 1886, issued by defendant, was \$304,373,540.

"4. That on the second day of May, 1887, and long prior thereto, John K. Cravens was a citizen of the state of Missouri and resident of the county of Jackson in said state; that on the said date and long prior thereto said John K. Cravens was the husband of Fannie Cravens, the plaintiff herein, and thereafter continued to be the husband of said plaintiff, Fannie Cravens, until the time of his death.

"5. That the defendant, in the transaction of its business, had adopted different forms of policies, embodying different and varying plans of insurance, all of them being on the mutual plan; the premiums paid, less the expense of management, being administered solely for the benefit of the policy-holders, defendant having no capital stock.

"6. That on the second day of May, 1887, the local agents of defendant solicited said John K. Cravens at his residence in the county of Jackson and state of Missouri to insure his life in the defendant company, and submitted to him the different plans of insurance then in use by said defendant, and said John K. Cravens selected the plan known as the nonforfeiting, limited tontine policy fifteen-year endowment with limited premium return, and signed a written ⁵⁹⁴ application therefor, and also signed the same in the name of the plaintiff, Fannie Cravens, as beneficiary of the policy to be issued thereunder, which said application is herewith filed and made a part hereof as fully as if set forth herein. Said written application was thereupon delivered to defendant's agent at Kansas City, and was by him forwarded with the report of the medical examination of said Cravens, which said medical examination of said Cravens was made by the examiner of defendant company at Kansas City, in the state of Missouri, and by said agent forwarded to defendant's home office in the city of New York.

"7. That thereafter on the tenth day of May, 1887, said application and medical examination was received at the home office of the defendant in the city of New York, state of New York, and was there examined by the officers of defendant, and on the eleventh day of May said application and medical examination was accepted and approved, and the policy in suit, No. 250,213, was thereupon executed by the officers of said defendant at said home office, which said policy is herewith filed and made a part hereof as fully as if set forth herein.

"8. That said policy was transmitted by defendant to its agents at Kansas City, in Jackson county, and on the twentieth day of May, 1887, the policy was delivered to said Cravens, in the county of Jackson, in the state of Missouri, by said agent, and the first premium of \$589.50 was paid by said Cravens, in the state of Missouri, to the said agent of defendant, and by said agent transmitted to defendant's home office.

"9. That said Cravens thereafter paid to defendant the premiums due upon said policy upon the eleventh day of May, 1888, and on the eleventh day of May, 1889, and on the eleventh day of May, 1890, the amount of each of said premiums being received by the agent of the defendant from said Cravens at defendant's branch office in Kansas City, and transmitted to ⁵⁹⁵ defendant's home office, said agent delivering therefor to said Cravens receipts of defendant signed by the chief officers of the company, and countersigned by said agent.

"10. That default was made in the payment of the premium due, on the eleventh day of May, 1891, and said premium has not been paid, and no subsequent premium has been paid.

"11. That said John K. Cravens died in Kansas City, in the state of Missouri, on the second day of November, 1892, and thereafter, on the thirtieth day of November, 1892, proofs of death in due form as called for by the policy of insurance were by Fannie Cravens made out and delivered to defendant and received by defendant. A copy of said proofs of death is herewith filed . . . and made a part hereof as fully as if set forth herein.

"12. That the amount of paid-up insurance to which the policy in suit, No. 250,213, was entitled according to the terms of the application and policy was \$2,670, but no demand for such paid-up policy was made by, or on behalf of, said Cravens within six months after default on May 11, 1891, or at any time; that defendant, upon the death of said Cravens, offered to waive the failure to make such demand, and tendered plaintiff, and still tenders, the amount of said policy, to wit, \$2,670, which she declined and still declines to receive.

"13. At the date of the issuance of said policy the only statute of the state of New York regulating, or in any way relating to the forfeiture of life insurance, is that set forth in chapter 341 of the Laws of 1876, of the state of New York, as amended by chapter 321 of the Laws of 1877, of the said state, which said statutes may be referred to as if set forth in full herein.

"14. The total number of policies issued during the year

1887 by defendant on the "nonforfeiting limited tontine policy plan, with fifteen years tontine period," constituting the same tontine class with policy No. 250,213, issued to the ⁵⁹⁶ residents of all the states and countries wherein defendant did business, was five thousand one hundred and seventy-two (5,172), covering aggregate insurance in the sum of \$20,154,981.

"15. That said John K. Cravens, on the eleventh day of May, 1891, was fifty-three years of age, and the term of temporary insurance procured at that date by three-fourths of the net value of the policy taken as a single premium for the amount written in the policy, was six years and forty-six days from the eleventh day of May, 1891, making said policy, if subject to said extended insurance, in force at the date of the death of the said Cravens.

"16. The amount which plaintiff claims under said policy is the face of the policy, to wit, \$10,000, less the amount of unpaid premiums with interest thereon, leaving a balance claimed of \$8,749.21, with interest thereon at the rate of six per cent per annum from the thirtieth day of November, 1892, and the defendant admits and offers to pay the aforementioned sum of \$2,670, which the plaintiff declines to receive."

The several sections of the Revised Statutes of 1879, in force at the date of the policy sued on, and having any bearing upon the issues involved, are as follows:

"Sec. 5983. Policies nonforfeitable, when.—No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums be forfeited or become void, by reason of the nonpayment of premiums thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium ⁵⁹⁷ payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest afore-

said; but, if the policy shall be an endowment, payable at a certain time or at death, if it should occur previously, then, if what remains, as aforesaid, shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of the premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

"Sec. 5984. A paid-up policy may be demanded, when.—At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and one-half per cent per annum, without deduction of indebtedness on account of said policy, will purchase applied as a single premium upon the table rates of the company; and, in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or death, it shall be for an amount bearing such proportion to the amount of ⁵⁹⁸ the original policy as the number of complete annual premiums, actually paid, shall bear to the number of such annual premiums stipulated to be paid; provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and, provided further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy legally discharged at the parent office of the company.

"Sec. 5985. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premium, anything in the policy to the contrary notwithstanding.

provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum, of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

"Sec. 5986. The foregoing provisions not applicable, when.— The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore; or for the unconditional commutation ⁵⁹⁹ of the policy to nonforfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984; or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy; or, if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable."

The plaintiff contends that the contract of insurance which forms the basis of this suit is a Missouri contract, and must be governed by its laws, notwithstanding the defendant is a corporation incorporated under the laws of the state of New York, has its chief office there, and that the contract provides that the contract contained in the policy and application shall be construed according to the laws of the state of New York, the place of said contract being agreed to be the home office of said company in the city of New York. This contention is predicated not only on the fact that the contract also provides "that under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premiums by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for," but upon the further fact that the application was by defendant's agent in Kansas City, Missouri, transmitted to defendant at its home office in said city, upon receipt of which the company issued the policy containing the clause quoted, sent

the same to its agent at Kansas City, who afterward delivered the policy to the insured in Missouri and then and there received the first premium.

However perfect in form the contract may have been, and although all of its other terms and conditions may have been complied with, payment of the premium during the life and good health of the assured, and delivery of the contract ⁶⁰⁰ to him were conditions precedent in order to complete its execution, and, as the premiums were paid and the policy delivered to the assured in this state, it must follow that the contract was executed here.

Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, was a suit upon a life insurance policy executed in New York by a corporation of that state doing business in this state, upon an application signed in this state by one of its residents, and made part of the contract, which provided that it should not take effect until the first premium was actually paid during the life of the person proposed for insurance, and which was delivered and the first premium paid in Missouri, and it was held in the absence of evidence of the company's acceptance of the application in New York, to be a Missouri contract and governed by the laws of Missouri.

In Hicks v. National Life Ins. Co., 60 Fed. Rep. 692, it is said: "If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premiums paid there, is a New York contract, notwithstanding it is signed and issued by the insurer in another state, the reference is supplied by the case of Equitable Life Assur. Soc. v. Clements, 140 U. S. 226. The delivery of the policies in the present case was made in New York City to an agent of the assured, and in legal effect was as if the assured had been personally present and received them. Then, and not before, the policies took effect."

In Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. Rep. 225, an application for a policy was made at Portland, Oregon, to the company's agent, who forwarded the same to the company at Milwaukee, Wisconsin. The company thereupon, in Wisconsin, issued its policy, containing a clause, viz.: "This policy shall not take effect and become binding on the company until the premium shall be actually paid, during the lifetime of the person whose life is assured, to the company or some person authorized to receive it, who ⁶⁰¹ shall countersign the policy on receipt of the premium," and transmitted the same to its agent

at Portland, Oregon, who there delivered it to the insured. The court said: "Where, then, was this contract made, in Wisconsin or Oregon? The answer to this question involves the inquiry, Where did the final act take place which made the transaction a contract binding on the parties? The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And, until it was binding on the company it was not binding on the applicant; in short, it was not yet a contract, but only a proposition": *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 400; *Thwing v. Great Western Ins. Co.*, 111 Mass. 109; *Wood on Fire Insurance*, 189, note 2; *Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. Ann. 242; *St. Louis Mut. Life Ins. Co. v. Kennedy*, 6 Bush, 450.

In *Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep. 526, the policy was delivered in Missouri, to a citizen of Missouri, and the first premium there paid. The court said: "The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policies, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can, by special contract, upset the statutes of the state and become exempt from the requirements of law. Such a proposition ⁶⁰² is not to be countenanced. The defendant corporation chose to embark in business within this state, under the terms and conditions named in the statute. It could not, by paper contrivances, however specious, withdraw itself from the operation of the laws, by force of which it could alone do business within the state. To hold otherwise would be subversive of the right of a state to decide on what terms, by comity, a foreign corporation should be admitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be

recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the state creating it, and, when it undertakes business beyond, it does so only by comity. The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, et cetera, withdraw itself from the obligatory force of the statute. The contract of insurance, therefore is a Missouri contract, and subject to the local law."

In the case of *Wall v. Equitable Life Assur. Soc.*, 32 Fed. Rep. 275, it was said: "The defendant is a New York corporation doing business in the state of Missouri; the insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that state, and sent to Missouri, and delivered to the applicant here. By the terms of the policy, all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York. . . . Under these facts, I have little doubt as to the true answer to be made to this first question, viz.: 'Is the contract sued on governed and to be construed by the laws of the state of New York, or by the laws ⁶⁰³ of the state of Missouri?' In *White v. Connecticut etc. Ins. Co.*, 4 Dill. 177, it was held that the act of the legislature of the state of Missouri, March 23, 1874, in respect to policies of life insurance extends to all policies of life insurance delivered in this state after the act went into effect. That was a suit against a foreign insurance company doing business in the state. In *Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep. 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statute of a state in which it does business by the insertion of clauses in its policies. That was a case in which the defendant company insisted that, by virtue of certain clauses in the application, the contract was to be finally and fully executed in New York. In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat uses this language: "The defendant corporation, having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of applications, withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Mis-

souri contract and subject to the local law.' . . . In view of these authorities, and considering the reason of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss the question further, and simply hold that the Missouri statute controls." This case was affirmed in the United States supreme court.

The same rule is announced in *Equitable Life Assur. Soc. v. Winning*, 58 Fed. Rep. 541, *Berry v. Knights Templars' etc. Co.*, 46 Fed. Rep. 439, and in *Price v. Connecticut Mut. Life Ins. Co.*, 48 Mo. App. 281.

It is true that there was no express provision in the contract which formed the basis of the Clements suit, *supra*, as there is in the case at bar with respect to the state by whose laws the contract should be construed, or as to the ⁶⁰⁴ place of contract; but defendant was at the time of the execution of the contract doing business in this state *ex gratia*, and could not, with respect to such business, evade the statute of this state or withdraw itself from its operation by the insertion of clauses in the policy: *Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep. 526; *Wall v. Equitable Life Assur. Co.*, 32 Fed. Rep. 275.

In *Price v. Connecticut Mut. Life Ins. Co.*, 48 Mo. App. 281, it is said: "Where an insurance company does business in this state, and issues its policies to residents of this state, the validity of clauses in its policies must be determined by the laws of this state. The laws of this state establish a rule of public policy, which overrides the freedom of contract of the parties, and makes waiver of statutory provisions ineffectual, although such waivers are contained in the strongest terms in the policies."

Foreign insurance companies which do business in this state do so, not by right, but by grace, and must, in so doing, conform to its laws; they cannot avail themselves of its benefits, without bearing its burdens. Moreover, the state may prescribe conditions upon which it will permit foreign insurance companies to transact business within its borders or exclude them altogether, and in so doing violates no contractual rights of the company: *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638, 172 U. S. 557.

It is, therefore, concluded that the contract is a Missouri contract and governed by the laws of this state. Being a Missouri contract, the statute then in force with respect to the subject matter of the contract entered into and became part thereof, as much so as if copied therein: *State v. Berning*, 74 Mo. 87; *Reed*

v. Painter, 129 Mo. 680; Havens v. Germania Fire Ins. Co., 123 Mo. 403, 45 Am. St. Rep. 570; White v. Connecticut etc. Ins. Co., 4 Dill. 177.

The question then is, Could the parties themselves enter into a contract either directly or indirectly waiving the provisions of the statutes?

⁶⁰⁵ It was held in *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, that sections 5983, 5986, *supra*, established a rule of commutation upon default in payment of premiums after two premiums have been paid on a policy of life insurance, which could not be raised or waived by express provision in the contract, except in the cases specified in those statutes. The court said: "The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in section 5983, 'no policy of insurance,' issued by any life insurance company authorized to do business in this state, 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation,' and, in section 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.' This construction is put beyond doubt by section 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections 'shall not be applicable,' necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy. . . . It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums ⁶⁰⁶ have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or

not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

The recent case of the Equitable Life Assur. Soc. v. Nixon, 81 Fed. Rep. 796, was a suit upon a policy issued by the company, a corporation of the state of New York, and doing business in the then territory of Washington. The assured paid all premiums that accrued prior to July 14, 1890, according to the terms of the policy, but made default in the payment of the premium which fell due on that day, in consequence of which the corporation insisted that the policy was rendered void. The court observed: "That depends upon whether the contract is to be regarded as a Washington or a New York contract; for there is no statute of Washington affecting that provision of the policy which declares that, 'if any premium or installment of a premium on this policy shall not be paid when due, this policy shall be void.' In the state of New York there is such a statute, and hence, the principal question in the case is, whether the policy in suit was a New York contract, and to be ruled in accordance with the statute of that state, or to be governed by the principles of the common law, which are in force in Washington in respect to such contracts of insurance. We think it clear that the policy in question was a New York contract. . . . It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that state, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the state (then territory) into which the defendant corporation went to solicit the business in question; for it may be true that every foreign corporation that enters a state other than that of its creation, and there transacts business, does so in subordination to the ⁶⁰⁷ statutes of the state permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statutes of the state permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question."

It is manifest from this decision that if the statutes of Washington had prohibited the forfeiture of the policy upon the ground of the nonpayment of premiums when due, as do the statutes of this state, that the conclusion reached would have been different.

The rule to be deduced from the authorities seems to be, that,

when no statute intervenes prohibiting it, a corporation doing business by permission in another state from that of its incorporation may, by contract, make the law of the state of its incorporation the applicatory law of the contract, but that, where the law of the state in which it does business by license prohibits such corporations from making certain kinds of contracts, they can only act in accordance therewith.

As the nonforfeiture clause in section 5983 does not come within the exceptions specified in section 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse after being in force three full years by the nonpayment of premiums is void and of no effect, and that such statutory provision cannot be waived.

While defendant does not concede that the policy in suit can, upon any theory, be held subject to the statutes of this state, it is insisted that the facts of this case bring the policy within the exception provided by section 5986, as the unconditional commutation paid-up insurance provided therein was equal at the time of default to that provided by section 5984 of the statutes, and the provision for extended insurance by the express terms of the statute was, therefore, not applicable.

608 By the provisions of section 5986, *supra*, the three preceding sections are made inapplicable in case the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance therefor provided therein, or for the unconditional commutation of the policy to nonforfeitable paid-up insurance, for which the net value shall be equal to that provided for in section 5984.

The policy was a fifteen-year payment life. It provided that, in the event of default after being in force three full years, "a paid-up policy will be issued on demand made within six months after such lapse, with surrender of this policy, under the same conditions as this policy except as to payment of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual payments paid thereon when said default in the payment of premiums shall be made."

The provision with respect to a paid-up policy provided by section 5984 of the statute is as follows: "That on demand made within sixty days of default the company shall issue its paid-up policy, which, . . . in case of a limited payment life policy or of a continued payment endowment policy, payable at

a certain time or at death, shall be for an amount bearing such a proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear the number of such annual payments stipulated to be paid" (also providing for the deduction of indebtedness, and the surrender of the original policy).

It is argued that this comparison of the statute with the policy must obviously be made at the date of default, when the right of the insured to the benefit of his reserve matures. And as at this date, May, 1891, Mr. Cravens had paid four premiums, he was entitled to a commutation to ⁶⁰⁰ paid-up insurance of the precise amount fixed by section 5984. That the method of computation is identical, and therefore the value of the paid-up policy to which the insured was entitled at the time of the default on making demand thereof was precisely what he was entitled to under the statute. That it is immaterial under the policy that he had six months in which to make his demand, and under the statute only sixty days, or that he failed to make demand of the company for a paid-up policy, and that the company waived this failure, as the comparison must be made at the date of default, as his rights under the policy became fixed at that time.

We are, however, inclined to a different view, and that this policy does not come within the provisions of, and is not governed or affected by, section 5984.

This section, we think, has reference solely to paid-up policies, and gives the holder of a policy who is entitled to extended insurance under section 5983 the right to compel the company, within a limited time from the beginning of such extended insurance, to convert the extended insurance into a paid-up policy of a prescribed value, if he so desire, but that this right ceases at the expiration of sixty days from the date that the unpaid premium becomes due, and, if no demand be made within that time, the right to paid-up insurance no longer exists. No demand for paid-up insurance was made in this case, and this section cannot be considered as controlling the rights of the parties to this action. Section 5986 exempts from the control of sections 5983, 5984, and 5985 policies of insurance which contain a provision for an unconditional cash surrender of a fixed minimum amount, and policies which contain a provision for unconditional commutation to nonforfeitable paid-up insurance of a fixed minimum amount and also exempts from the control of said sections cases wherein the holder

of the ⁶¹⁰ policy shall, within sixty days after default is made in the payment of the premium, surrender the policy and accept from the company another form of policy, or such consideration as the holder of the policy may be entitled to under it.

This policy contains no provision for a cash surrender value, nor has anything been done by its holder to bring it within either of the two exempted cases.

The question then arises, Does the policy provide for its own unconditional commutation to nonforfeitable paid-up insurance? The policy contains this provision: "That if the premiums are not paid as heretofore provided, on or before the days when due, then this policy shall become void and all payments previously made shall be forfeited to the company, except that . . . if this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium, a paid-up policy will be issued on demand, made within six months after such lapse, with surrender of this policy," et cetera.

There can be no question but that it was a condition precedent to the right of the holder of the policy in question after it lapsed for the nonpayment of premiums to a paid-up policy, that demand be made therefor, with surrender of the policy, within six months after the policy lapse, and no such demand could be waived by defendant so as to affect plaintiff's rights.

Hanthorne v. Brooklyn Life Ins. Co., 5 Mo. App. 73, was a suit in equity to enforce specific performance of a contract of life insurance. The policy contained the following clause: "After two annual payments, should the party wish to discontinue (notice to the company being given before the net premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash." The assured paid more than two annual premiums. ⁶¹¹ On December 28, 1871, another premium became due which he failed to pay. In January, 1872, he notified the company that he wanted to discontinue his policy, and demanded a paid-up policy, which the company refused to issue, upon the ground that the assured had failed to comply with the conditions in the provision of the policy quoted. It was held that, by an express term of the policy, the defendant had a right to notice, before the then next premium became due, of the assured's wish to discontinue and to demand a paid-up policy, which was a condition prece-

dent to his right thereto, and, in the absence of such notice, he was not entitled to recover.

Knapp v. Homeopathic etc. Life Ins. Co., 117 U. S. 411, was a suit upon a policy of life insurance, which provided, "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void, and of noneffect," and it was held that the surrender of the policy, and the application for a paid-up policy within ninety days after nonpayment of the premium were conditions precedent to plaintiff's right to recover.

The same rule is announced with respect to policies containing similar provisions in the following cases: *Sheerer v. Manhattan Life Ins. Co.*, 16 Fed. Rep. 720; *Northwestern Mut. Life Ins. Co. v. Barbour*, 92 Ky. 427; *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167; *Coffey v. Universal Life Ins. Co.*, 10 Biss. 354.

Price v. Connecticut Life Ins. Co., 48 Mo. App. 281, was a suit upon a life insurance policy containing this provision, viz.: "If, after the payment of two or more annual premiums as above, any subsequent premium or installment of premium be not paid when due, said company do thereupon and thereafter, and upon the same consideration hereinbefore set forth, but without further payment of premiums, insure said life for said term, but only in a sum to be ascertained by the ⁶¹² table of paid-up insurance indorsed herein, and hereby made a part of this contract, such sum to be payable at the time and place and in the manner and to the persons above named." In that case the assured died after having made two full annual premiums on said policy. The last installment was paid March 4, 1888. The administrator of the assured claimed that the policy at the date of the payment of the last installment of premiums had acquired a net value of \$80 to be computed according to the terms of the policy, and that three-fourths of such net value, taken and applied as a net single premium for temporary insurance for the full amount written in the policy, entitled the insured to temporary insurance for \$2,000 for a term expiring March 4, 1889, and brought suit for that sum. The defendant company resisted the recovery, on the ground that the value of the policy, and the amount which the representatives of the assured were entitled to recover thereunder, must be determined by the terms of the contract between the assured and the company, and not by the provisions of the statute of the state

of Missouri, the provisions of which were expressly waived by the parties, and were inapplicable under the exceptions made by section 5986. As there had been paid more than two full annual premiums on the policy, plaintiff claimed temporary insurance under section 5983, but the court held that the clause in the policy quoted provided for the unconditional commutation of the policy to nonforfeitable paid-up insurance; that the policy came within the second exception of section 5986, and that plaintiff was entitled to paid-up insurance, according to the terms of the policy, and not to temporary insurance under the provisions of section 5983. It does not appear that the policy in suit in that case required that a demand for a paid-up policy be made on the company at any time before it would agree to issue such a policy, in which event plaintiff's policy would ⁶¹³ have been a conditional one, and would have entitled the holder to temporary insurance for the face of the policy under section 5983.

But, in the case at bar, the policy required that demand be made for a paid-up policy within six months after default in the payment of premium, before the holder was entitled to a paid-up policy. Whether the holder would exercise that right or not was discretionary with him, and not for defendant to decide for him. It follows that the policy in suit is not governed by section 5986. It is, however, controlled by sections 5983 and 5985.

By section 5983, three-fourths of the net reserve is applied on the policy as a single premium which continues the full amount of the policy in force, and then prescribe a rule for fixing the term for which such temporary insurance shall be in force.

By section 5985, it is provided that, if the death of the assured occur within the term of temporary insurance covered by the policy, the company shall be bound to pay the amount of the policy, less the unpaid premiums, with compound interest thereon at six per cent.

The policy was a fifteen-year endowment issued May 11, 1887, for \$10,000; age of the assured at that time was forty-nine years. Four annual premiums of \$589.50 were paid on it, default being made in the payment of the premium which fell due May 11, 1891. Its net value based upon American experience table of mortality with interest at four and one-half per cent at the date of default in payment of premium, was \$1,957.-21. Under section 5983 of the Revised Statutes of 1879 three-fourths of the net value, or \$1,467.91, is applied as a single pre-

mium for temporary insurance at the attained age of the insured at the time of default in payment of premium.

The insured at time of default in premium in this case being fifty-three years old, and the amount to be applied as a ⁶¹⁴ single premium for temporary insurance, \$1,467.91, the insurance is in force for a period of nine years and seventy-one days from the date of lapse, May 11, 1891, and upon this basis plaintiff is entitled to recover.

It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether if so inclined: *Paul v. Virginia*, 8 Wall. 168; *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388; *Hooper v. California*, 155 U. S. 648; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638. This case has recently been affirmed by the supreme court of the United States.

It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the state constitution, and that such legislation is not in conflict with any provision of the constitution of the United States.

For these considerations we reverse the judgment and remand the case, with directions to the court below to enter up judgment for plaintiff in accordance with the views herein expressed.

Gantt, C. J., Sherwood, Brace, Robinson, JJ., concur; Marshall, J., absent; Valliant, J., not sitting.

FOREIGN INSURANCE COMPANIES—LIMITATIONS UPON TRANSACTION OF BUSINESS.—The state has power to regulate and control the business of a foreign insurance company within its boundaries: *State v. Phipps*, 50 Kan. 609, 34 Am. St. Rep. 152. It has power to prevent the making of contracts within its borders by foreign corporations, or it may impose such terms as it may deem expedient, provided they do not conflict with the exclusive powers of Congress: *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 20 Am. St. Rep. 395.

FOREIGN INSURANCE COMPANIES—WHAT LAW CONTROLS.—A foreign insurance company may make and enforce only such contracts as are not prohibited by the state where the contract of insurance is made or sought to be enforced: *Note to State v. Phipps*, 34 Am. St. Rep. 161. Having availed itself of the privilege of doing business within a state under the restrictions of a valid statute, its contracts of insurance therein must be governed by such statute: *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638; *note to State Mut. etc. Ins. Assn. v. Brinkley etc. Heading Co.*, 54 Am. St. Rep. 196; *Rose v. Kimberly*, 89 Wis. 544, 46 Am. St. Rep. 855; *Wood v. Cascade etc. Ins. Co.*, 8 Wash. 427, 40 Am. St. Rep. 917; *Seamans v. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457.

INSURANCE—PLACE OF CONTRACT OF.—If an application for insurance is made in one state to an agent therein, and forwarded by him to the insurer in another state, where the policy is executed, and sent to such agent, and by him delivered to the insured in the former state, the contract must be regarded as made in the state where delivered, and as subject to its laws: *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 68 Am. St. Rep. 668. Compare *State Mutual etc. Ins. Assn. v. Brinkley etc. Heading Co.*, 61 Ark. 1. 54 Am. St. Rep. 191; *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406, 34 Am. St. Rep. 766; *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114. A fire insurance policy written on real property situated in one state, delivered, and accepted by the owner there, is a contract made in that state, and must be construed according to its laws, though issued by a foreign insurance company: *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638.

INSURANCE—PLACE OF CONTRACT—STIPULATION AS TO. A contract of insurance, where the insurer and the insured reside in different states, may, it is said, adopt the law of either state by express provisions contained in such contract, and, when such is the case, it will be deemed a contract of the state thus adopted; but a state may enact a statute applicable to all insurance policies delivered within that state, and, if so, a foreign insurance company doing business therein is bound by such statute, though the insurance may have been accepted and the policy issued in another state: See monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 51. 52; *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. Rep. 715. Compare *Goodwin v. Provident Savings etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411. Under the statute of North Carolina, providing that "all contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within the state, and subject to the laws thereof," a policy of insurance issued by a foreign company upon an application made in that state is governed by such statute, no matter what the form of the contract may be: *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717.

INSURANCE—STATUTES AS PART OF CONTRACT OF.—The statutes of a state in which a contract of insurance is made are as much a part of it as if incorporated in it: *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. Rep. 715. Statutes are paramount to stipulations in a contract of insurance: Note to *Marston v. Kennebec Mut. Life Ins. Co.*, 56 Am. St. Rep. 423.

TOURVILLE v. WABASH RAILROAD COMPANY.

[148 MISSOURI, 614.]

ATTACHMENT—GARNISHMENT—JUDGMENT OF ANOTHER STATE—"FAITH AND CREDIT."—If state laws authorizing a garnishment proceeding are not complied with, a judgment therein may be pronounced void in another state without depriving it of that "faith and credit" to which, under the constitution of the United States, it is entitled in the courts of the latter state.

COURTS—POWER OF, AFTER CAUSE IS REMANDED, WITH DIRECTIONS—JUDGMENT.—If an appellate court remands a cause, with directions "to enter judgment for the plaintiff" in a certain amount, the lower court has no judicial discretion in the premises. It has no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed.

JUDGMENT, FINAL—REMANDING CAUSE, WITH DIRECTIONS.—When an appellate court remands a cause, with directions "to enter judgment for the plaintiff" in a certain amount, the judgment of the appellate court is a final judgment in the cause, and the entry of that judgment in the lower court is a purely ministerial act.

EXECUTION AFTER CAUSE IS REMANDED.—After the lower court has entered a judgment for the plaintiff in a certain amount, in accordance with the remanding directions of an appellate court, it commits no error in issuing execution on the judgment, nor in overruling the defendant's motion to quash the execution, on the ground that it is erroneous because of a judgment against the defendant, in another state, as garnishee.

JUDGMENT—DEBT—MERGER OF CAUSE OF ACTION. When a debt is sued for, a final judgment merges the cause of action into the judgment, from its date. The old debt ceases to exist and the new, or judgment, debt takes its place.

ATTACHMENT—GARNISHMENT OF JUDGMENT IN ANOTHER STATE.—After a debt has been reduced to final judgment, it is not subject to garnishment in another state.

George S. Grover, for the appellant.

Virgil Rule, for the respondent.

618 **BRACE, J.** The defendant is a consolidated railway corporation separately organized under the laws of Michigan, Ohio, Indiana, Illinois, and Missouri, having business offices and agents in all of these states.

619 On the 3d of June, 1891, the plaintiff Tourville, a resident of the state of Missouri, being indebted on a promissory note to one Flannigan, a resident of the state of Illinois, the said Flannigan instituted a suit against him by attachment for the recovery of such debt before a justice of the peace in that state, in which, on the same day, the defendant railroad company was served with notice of garnishment in that state

under the laws thereof. Afterward, on the 10th of June, 1891, the plaintiff instituted this suit against the defendant railroad company before a justice of the peace in the city of St. Louis to recover the sum of \$81.98 on account of wages due him, not subject to execution, attachment, or garnishment under the laws of Missouri. The defendant made default, and judgment was rendered against it in the justice's court, and thereupon the defendant took an appeal to the St. Louis city circuit court. In the mean time the attachment suit in Illinois having proceeded to judgment on the 25th of July, 1891, in the justice's court, against the railroad company for the sum of \$21.80 and costs on its answer admitting its indebtedness to Tourville on account of the wages aforesaid in the sum of \$71.83, but pleading the exemption of the sum from garnishment under the laws of Illinois and Missouri, and that judgment having been affirmed on defendant's appeal, by the city court of East St. Louis in that state, on the 21st of December, 1891, and the railroad company having paid that judgment, amounting to the sum of \$43.38, on the 6th of January, 1892; when this case came on for trial in the St. Louis circuit court, on the 23d of January, 1892, this defendant railroad company interposed that judgment as a defense in part to plaintiff's action, and the circuit court allowed the same as a credit on plaintiff's demand, and rendered judgment in his favor against the defendant for the sum of \$38.60, the balance of the amount sued for. From this judgment both parties appealed to the St. Louis court of appeals, ⁶²⁰ where on the 26th of March, 1895, the judgment was reversed "and the cause remanded, with directions to the trial court to enter judgment for plaintiff for \$81, the amount sued for": *Tourville v. Wabash R. R. Co.*, 61 Mo. App. 534.

Afterward, on the 1st of April, 1895, and before the mandate of the court of appeals reached the circuit court, Flannigan instituted another suit by attachment against the plaintiff before a justice of the peace in the state of Illinois to recover the balance due on his debt, in which, on the same day, the defendant was served with notice of garnishment. The writ in this proceeding was returnable April 27, 1895, and while the same was pending in Illinois, the mandate of the St. Louis court of appeals in this case reached the St. Louis city circuit court, and on the third day of May, 1895, the defendant offered to said court, as evidence in the case, the affidavit, attachment bond, and writ, with the service thereon upon the defendant as garnishee, in the said second attachment suit so instituted by the

said Flannigan against the plaintiff on the first day of April, 1895, in the state of Illinois. To the admission of this evidence the plaintiff objected; his objection was sustained. The defendant excepted, and thereupon the court entered judgment in his favor against the defendant for the said sum of \$81 in pursuance of the mandate of the St. Louis court of appeals. The defendant again excepted, and on the same day filed its motion to set aside the judgment and for new trial, on the ground that, by entering said judgment and rejecting said evidence, the court refused to give full faith and credit to a valid proceeding instituted against the defendant in a sister state, in violation of section 1, article 4, of the constitution of the United States. Which motion was overruled on the tenth day of June, 1895, and the defendant excepted. On the 25th of June, 1895, defendant filed its motion to modify the judgment, and in support of said motion and as a part thereof, on the fifth day of July, 1895, filed a transcript and ⁶²¹ copy of the proceedings in the second attachment suit in Illinois, showing judgment therein against Tourville in favor of Flannigan for \$139.30 on the 15th of May, 1895, and judgment in his favor against the railroad company as garnishee for \$81.98 on the 14th of June, 1895, and by reason thereof the defendant in its motion asked that the judgment in this case be modified by deducting therefrom the amount of said Illinois judgment. On the 5th of July, 1895, plaintiff filed a motion to strike the defendant's bill of exceptions from the files, and on the eleventh day of October, 1895, caused execution to be issued upon the judgment. On the 12th of October, 1895, the defendant filed its motion to quash said execution, assigning the same reasons therefor as in its former motions, and on the 4th of December, 1895, the court overruled defendant's motions to modify the judgment and quash the execution, to which action of the court defendant excepted, and thereafter in due time perfected its appeal.

1. In order to convict the circuit court of error, much reliance is placed by counsel for defendant upon the case of Wyeth etc. Co. v. Lang, 127 Mo. 242, 48 Am. St. Rep. 626, followed in Howland v. Chicago etc. Ry. Co., 134 Mo. 474, in which it was held "that debts have no situs, but may be attached in any state other than that in which the debtor is a resident," or, in the language of the syllabus of the first case: "Wherever a creditor may maintain a suit to recover his debt, it may be attached there as his property, provided the laws of such place authorize it." For the plaintiff it is urged that the doctrine of these cases is

against the weight of authority, and should be overruled. In the view we take of the facts of this case, however, we do not find it necessary to enter into this discussion, and refrain from doing so for the reason that anything therein said might be considered obiter the case in hand. Nevertheless, it may be well to note, in this connection, that the defendant in this case has a separate and independent corporate existence both in this state and in the state ⁶²² of Illinois. "Railroad corporations, created by two or more states, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it was created, and the union of name, of officers, of business, and of property does not change their distinctive character as separate corporations": *Nashua R. R. Corp. v. Boston etc. R. R. Co.*, 136 U. S. 356. So that in the defendant we have two legal entities, one a corporation and citizen of Illinois, the other a corporation and citizen of Missouri. With the former the plaintiff had no dealings, and it owed him nothing. The latter became indebted to him in the sum of \$81 for wages earned in Missouri, and under the law thereof exempt from attachment, execution, and garnishment, and while it may be difficult to see how this debt due the plaintiff from the Wabash Railroad Company of Missouri could be impounded in the courts of Illinois by the service of garnishment process on the Wabash Railroad Company of Illinois, the ruling of the court of appeals was not based upon the ground that it was not so subject. On the contrary, that court, conceding the fact that the debt was subject to garnishment in the courts of Illinois, held that the laws of that state authorizing the proceeding had not been complied with, and the judgment by reason thereof was void, thus giving that proceeding all the faith and credit it was entitled to in the courts of this state, as was the measure of its duty under the constitution of the United States. But whether it did so or not its action in that behalf could not be questioned or reviewed by the circuit court, which brings us to the actual case in hand.

2. The circuit court committed no error in rejecting the evidence of the proceedings in the second attachment suit ⁶²³ in Illinois in rendering judgment for the plaintiff or in refusing to modify that judgment. It is true if the judgment of the circuit court had been simply reversed and the cause remanded,

the case would have stood as though no judgment had ever been rendered, and the parties would have been entitled "to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been decided by any court": *Crispen v. Hannovan*, 86 Mo. 168. But such was not the case. The cause was remanded to the circuit court with directions "to enter judgment for the plaintiff for \$81," and the circuit court had no judicial discretion in the matter. It had no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed: *State v. Edwards*, 144 Mo. 467; *Rees v. McDaniel*, 131 Mo. 681; *Young v. Thrasher*, 123 Mo. 308; *Stump v. Hornback*, 109 Mo. 272; *Chouteau v. Allen*, 74 Mo. 56.

3. The court committed no error in issuing execution on the judgment, nor in overruling defendant's motion to quash the same. The judgment of the St. Louis court of appeals rendered on the 26th of March, 1895, was a final judgment in the cause: *Young v. Thrasher*, 123 Mo. 308; 1 *Black on Judgments*, sec. 34, p. 40, and cases, note 61; *Mower v. Fletcher*, 114 U. S. 127; *Smith v. Adams*, 130 U. S. 167.

The entry of that judgment in the circuit court was a purely ministerial act, carrying into execution the judgment of the appellate court of the date and effect as rendered by that court. One of the effects of that judgment was to merge the cause of action, the debt sued for, in the judgment. "It was drowned in the judgment." It thereby "lost its vitality" and "all its power to sustain rights and enforce liabilities terminated in the judgment": *Cooksey v. Kansas City etc. R. R. Co.*, 74 Mo. 477; 1 *Freeman on Judgments*, 4th ed., sec. 215; 2 ⁶²⁴ *Black on Judgments*, sec. 674. On the 26th of March, 1895, the old debt of the company to the plaintiff ceased to exist, and thereafter could not sustain any liability imposed thereon by the subsequent garnishment proceedings under the second attachment suit in Illinois: 15 *Am. & Eng. Ency. of Law*, 341. But it is contended that the new debt, the judgment debt which took its place, was subject to garnishment. There has been a difference of opinion as to whether a judgment debtor would be held at all as garnishee of the judgment creditor, even in the court in which the judgment was rendered, the courts in some of the states holding one way, and in some of them the other: *Drake on Attachment*, 7th ed., sec. 622. The learned author, after giving

some of the reasons sustaining the affirmative of the proposition, in section 625, says: "However strongly these reasons apply to the case of a garnishment of the judgment debtor in the same court in which the judgment was rendered, their force is lost when the judgment is in one court, and the garnishment in another. There a new question springs up, growing out of the conflict of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgment of another? Clearly, the attempt would be absurd, especially where the two courts were of different jurisdictions or existed under different governments." This was the very absurdity which the circuit court was called upon to perpetrate by the motion to quash the execution and the other motions of defendant in the case. In refusing to do so, it committed no error, and the judgment is affirmed.

All concur, except Marshall and Valliant, JJ., not sitting.

JUDGMENT OF SISTER STATE—INQUIRY INTO—"FAITH AND CREDIT."—Though the judgment of a sister state must, under the federal constitution, be accorded in this state the same "faith and credit" which it has in the state where it is rendered: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872; the record of such a judgment may be contradicted as to facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity: *Notes to Foshier v. Narver*, 41 Am. St. Rep. 879; *Crumlish v. Central Imp. Co.*, 45 Am. St. Rep. 883.

THE LOWER COURT IS BOUND BY THE JUDGMENT OF THE SUPREME COURT, and must carry it into execution according to the mandate: *Fortenberry v. Frazier*, 5 Ark. 200, 39 Am. Dec. 373.

JUDGMENT—WHEN FINAL.—A judgment is final if no further questions can come before the court, except such as are necessary to be determined in carrying it into effect: *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156; *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772.

EXECUTION UPON AFFIRMANCE OF JUDGMENT.—When a judgment has been affirmed on appeal, and the cause remanded to the court of original jurisdiction, the general rule is, that the prevailing party is entitled to have execution issue upon such judgment from the court thus reinvested with the custody of the record: *Rockwell v. District Court*, 17 Colo. 118, 31 Am. St. Rep. 265.

JUDGMENT—DEBT—MERGER OF CAUSE OF ACTION.—A judgment merges a debt due to the party in whose favor it is rendered: *Harris v. Alcock*, 10 Gill & J. 226, 32 Am. Dec. 158. A cause of action is merged in a judgment therefor: *Notes to Ryan v. Southern Bldg. etc. Assn.*, 62 Am. St. Rep. 836; *Henry v. Henry*, 71 Am. Dec. 355; *Clark v. Rowling*, 53 Am. Dec. 300; *Speed v. Hann*, 15 Am. Dec. 81. But a debt is not merged in a judgment until a valid judgment has been obtained upon it: *Wixom v. Stephens*, 17 Mich. 518, 97 Am. Dec. 205.

GARNISHMENT OF JUDGMENT—FOREIGN DEBT.—A judgment may be garnished in a suit against the judgment creditor when the process of garnishment issues from the same court, but not otherwise: *Scott v. Rohman*, 43 Neb. 618, 47 Am. St. Rep. 767. A garnishment in one state of a debt due and payable in another is void: *Note to Neufelder v. North British etc. Ins. Co.*, 45 Am. St. Rep. 799.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

NEW ENGLAND LOAN AND TRUST Co. v. ROBINSON.

[56 NEBRASKA, 50.]

MORTGAGES—ASSIGNMENT OF BOND COUPON.—The detaching of an interest coupon from a bond by the owner thereof, and transferring it to a third person, operate as an assignment pro tanto of the mortgage which secures the entire debt.

MORTGAGES—RIGHTS OF ASSIGNEE.—The provisions of a mortgage are not personal to the mortgagee, but inure to the owner of any part of the debt secured.

MORTGAGES—RIGHTS OF JUNIOR LIENOR.—The holder of a mortgage or other lien against property may discharge any prior lien existing against it for his own protection, and, for the purpose of reimbursing himself, add the amount due on the lien discharged to his own lien upon the property, and it is not necessary that this right should be stipulated for in an express contract between the property owner and the holder of the lien.

LIENS—RIGHTS OF JUNIOR LIENOR—VOLUNTARY PAYMENT.—The discharge by a lien holder of a valid prior tax, or other valid lien, is not a voluntary payment, but a payment in invitum.

NEGOTIABLE INSTRUMENTS—POSSESSION AS EVIDENCE OF TITLE.—The possession of a note, or other negotiable instrument payable to bearer, is prima facie evidence of the holder's ownership.

H. B. Smith, for the appellant.

C. H. Balliet, for the appellee.

51 RAGAN, C. Emily J. Robinson executed and delivered to the New England Loan & Trust Company her bond for two thousand five hundred dollars, due five years after date, drawing interest at the rate of six per cent per annum from date until maturity, and payable semi-annually, such interest evidenced by

ten coupons or interest notes of seventy-five dollars each, attached to said principal bond. The first of said coupons matured six months after the date of said principal bond, and one other coupon each six months thereafter. These coupons were payable to bearer. To secure the payment of the bond and coupons, Robinson executed and delivered to the trust company a mortgage upon certain real estate in Douglas county, Nebraska. The trust company brought this suit ⁵² in the district court of said county, alleging, among other things, that it had sold and transferred said bond and coupons, and the mortgage securing the same, to a third party and guaranteed the payment of said bond and coupons; that Robinson made default in the payment of coupons 9 and 10, and that the trust company, in accordance with its guaranty, had advanced and paid the amount due thereon to its assignee; and that it—the trust company—was then the owner and holder of said coupons. It claimed to have a lien upon the mortgaged real estate by virtue of the mortgage to secure the payment to it of said coupons, which lien, however, it claimed was subject to the lien of its assignee securing the payment of the principal bond. The trust company further alleged in its petition that, in order to protect its mortgage lien upon said real estate, it had advanced and paid certain state, county, and city taxes which had been legally levied and assessed, and were valid prior liens upon the property. The prayer of the petition was for an accounting of the amount due from Robinson to it on coupons 9 and 10, and for the taxes paid, and that said sum might be declared a lien upon the mortgaged property, subject only to the lien of its assignee securing the principal bond. The trust company had a decree as prayed, and Robinson has appealed.

1. It is first insisted that the trust company's petition filed in the district court does not state facts sufficient to constitute a cause of action. This argument is based upon counsel's contention that an owner only of an interest note or coupon of said loan cannot maintain an action to foreclose the mortgage securing the payment of such coupon; that a suit to foreclose the mortgage can be brought only by the owner of the principal bond. It is insisted that such is the express contract between the mortgagor and mortgagee, as found in the mortgage itself. The mortgage provided that in case the mortgagor should fail to pay the taxes upon the mortgaged property when due, or make default in the payment of any interest ⁵³ coupon when due, then "the whole of the indebtedness secured hereby shall be-

come due and collectible at once, at the option of the said second party [the trust company], without further notice, and shall bear interest at the rate of ten per cent per annum from the date of the bond secured hereby; and the holder thereof may recover the whole of the amount of said bond, with interest thereon." By this agreement the holder of the principal bond was given the option of declaring it due before maturity, by its terms, in case the mortgagor made default in paying the taxes or in paying his interest. But it is not a contract between the mortgagor and mortgagee which precluded the holder of an interest coupon from maintaining a suit either at law or in equity thereon; nor is it a contract providing that only the holder of the principal bond should be entitled to maintain a suit to foreclose the mortgage by reason of a breach of its conditions. The mortgage was given to secure the payment not only of the principal bond, but to secure the payment of the interest coupons as well; and the detaching of the coupon from the bond by the owner thereof and transferring it to a third party operated as an assignment pro tanto of the mortgage which secured the entire debt: *Burnett v. Hoffman*, 40 Neb. 569, and cases there cited; *Griffith v. Salleng*, 54 Neb. 362.

2. A second contention under the argument that the petition does not state facts sufficient to constitute a cause of action is, that the holder of the coupons could not pay taxes which were a lien upon the mortgaged real estate and recover such taxes from the mortgagor or the mortgaged property. The mortgage provided that if the mortgagor should neglect to pay the taxes on the mortgaged property, the mortgagee might do so, and recover the amount paid with ten per cent interest from the mortgagor, and that the mortgage should stand as security for the taxes so paid. The argument is, that the owner of the principal bond and mortgage might pay the taxes upon this mortgaged property and have a lien upon ⁵⁴ the property to secure their repayment, but that the payment of taxes by the holder of a coupon only was a voluntary payment; but the agreement of the mortgagor that, in case he failed to pay the taxes upon the mortgaged property when due, the mortgagee might pay the same, and have a lien upon the mortgaged property for their repayment, was an agreement, not only for the benefit of the original mortgagee, but one which inured to the lawful owner and holder of any part of the debt secured by this mortgage. But if the mortgage had contained no provision whatever upon this subject we think that the lawful owner and holder of this

particular bond, or of any coupon thereof, might discharge any prior valid lien upon the property for the protection of his own lien, and, to secure the repayment of the money so advanced, add the amount of that lien to his own: *Leavitt v. Bell*, 55 Neb. 57, and cases there cited. The holder of a lien upon property, either real or personal, may discharge any prior valid lien existing against the property, for his own protection, and for the purpose of reimbursing himself add the amount due on the lien discharged to his own lien upon the property; and it is not necessary that this right should be found in an express contract between the property owner and the holder of the lien. The discharge by a lien holder of a prior valid tax or other lien is not a voluntary payment, but a payment in invitum.

3. The petition of the trust company alleged that after it received the bond, coupons, and mortgage from Robinson, it transferred and sold them to a third party and guaranteed the payment of the mortgage debt, and that it subsequently, by reason of Robinson's default, was compelled to and did pay to its assignee the amount due on coupons 9 and 10. These allegations were denied by the answer of Robinson, and it is now argued that the finding of the district court that these allegations of the trust company's petition were true is not sustained by the evidence. The contention is correct. The evidence does not sustain that particular finding of the district ⁵⁵ court; but the petition of the trust company also alleged that it was the owner and holder of these coupons 9 and 10; and, while this allegation of the petition was denied by the answer, the evidence sustains the finding of the district court that the trust company, at the time this suit was brought, was the owner and holder of these coupons. We think, therefore, the finding of the district court that the trust company had sold and guaranteed the payment of this mortgage debt, and then to protect its guaranty had paid to its assignee these two coupons, becomes immaterial.

4. But it is insisted that the finding of the district court that the trust company, at the time of bringing this suit, was the owner of coupons 9 and 10 is not sustained by the evidence. We think it is. The execution and delivery of these coupons to the trust company by Robinson were admitted by her in her answer. They were payable to bearer, and they were in possession of the trust company, and produced on the trial. The possession of a promissory note payable to bearer is *prima facie* evidence of the holder's ownership of such note: *Sharmer v. McIntosh*, 43 Neb. 509; *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861.

5. The foregoing are the only points argued in the briefs of counsel which we deem it necessary to notice. The decree of the district court is right and is affirmed.

MORTGAGES—ASSIGNMENT OF ONE OF SEVERAL SECURED NOTES.—The transfer of a note secured by mortgage transfers the mortgage security to the purchaser without any assignment of the mortgage itself; and, where there are several notes secured by the same mortgage, the assignment of one of the notes is an assignment of a proportionate interest in the mortgage: *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714; *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565.

MORTGAGES.—THE ASSIGNMENT AND DELIVERY of a mortgage note transfers the mortgagee's title under the mortgage: *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685; *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322. *Contra*, *Hussey v. Hill*, 120 N. C. 312, 58 Am. St. Rep. 789.

MORTGAGES—RIGHT OF JUNIOR LIENOR.—The rule under which the holder of a junior mortgage is entitled to tender to the holder of a senior mortgage the amount due thereon and demand an assignment thereof, is not applicable unless the junior mortgagee shows that such an assignment is necessary to his protection: *Tillman v. Stewart*, 104 Ga. 687, 69 Am. St. Rep. 192. Or, unless there is an agreement: *Note to Johnson v. Barrett*, 10 Am. St. Rep. 87.

NEGOTIABLE INSTRUMENTS.—THE POSSESSION of an unindorsed note made payable to a third person is prima facie evidence of ownership in the holder: *Martin v. Martin*, 174 Ill. 371, 66 Am. St. Rep. 290, and note.

KYD v. COOK.

[56 NEBRASKA, 71.]

ATTACHMENT, WRONGFUL—PLEADING AND PROOF—LOSS OF CREDIT.—A complaint in wrongful attachment specifically alleging that plaintiff's credit was injured and destroyed because of the fact that the sheriff attached and removed his property and locked up and closed his place of business is sufficient, against a demurrer, on the ground of the omission to give the names of persons who refused plaintiff credit because of the attachment, and such averment is broad enough to admit evidence of all damages sustained by plaintiff in consequence of the wrongful attachment, including his loss of character, credit, and business.

DAMAGES—LOSS OF CREDIT.—For the loss of financial credit and standing through the wrongful act of another, a person may recover whatever pecuniary damages he can prove he has sustained thereby.

ATTACHMENT, WRONGFUL—LOSS OF PROFITS—EVIDENCE.—In a suit by a merchant against a sheriff for damages for wrongful attachment of his goods during a certain period, evidence of the sales and profits made by such merchant in his business, during a corresponding period of the previous year, under substantially

the same conditions, is competent, as affording a reasonably certain basis for determining the profits lost by the merchant in consequence of the interruption of his business.

ATTACHMENT, WRONGFUL.—THE MEASURE OF DAMAGES for wrongful attachment of property is all the loss and damage the owner has sustained thereby, including gains prevented by the attachment.

ATTACHMENT, WRONGFUL—LOSS OF PROFITS AS ELEMENT OF DAMAGE.—Loss of profits reasonably, naturally, and ordinarily expected to follow the closing up of a merchant's place of business may be recovered in an action for wrongful attachment of all his goods.

ATTACHMENT, WRONGFUL—MEASURE OF DAMAGES. In an action by a merchant to recover damages for a wrongful attachment, he is entitled to recover for the depreciation in value of the property seized, and the loss he has sustained by reason of the locking up of his store and the interruption of his business.

DAMAGES—INSTRUCTIONS.—The trial court is bound to instruct the jury, whether requested or not, upon the material issues of the case, but it is not bound to formulate or prescribe a method of computation which the jury should pursue in estimating damages.

EVIDENCE.—DECLARATIONS OF A VENDOR, made after conveyance, and while in the actual possession of the property, concerning the objects, intents, and purposes of the conveyance, are admissible in evidence as part of the *res gestae* when the conveyance is assailed as fraudulent. If he is not in possession, such declarations are admissible in such case as tending to establish the intent with which he made the conveyance, but not to disparage the vendee's title.

EVIDENCE—DECLARATIONS AGAINST TITLE.—Declarations by a vendor's vendor in disparagement of the vendee's title, made while the original vendor was out of the possession of the property, and not in the presence of the vendee, are hearsay and not admissible in evidence.

W. C. Le Hane and G. A. Murphy, for the appellants.

Griggs, Rinaker & Bibb and A. Haslett, for the appellee.

73 RAGAN, C. In 1893, George R. and Walter W. Scott, as copartners, were engaged in the furniture and undertaking business in the city of Beatrice. Some time in June of said year, George R. Scott sold his interest in said business to his partner. In July of said year Walter W. Scott sold said furniture and undertaking business to Harrison F. Cook. In October, 1893, Kountze Brothers brought a suit against Scott Brothers on a promissory note, and caused an attachment to be issued, under and by virtue of which the sheriff seized most of the stock of furniture in the possession of Cook, closed up his place of business, and kept it closed for ten days, removed the goods attached from the store, and retained possession of them until about January 12, 1894, at which time he returned them

to Cook. The goods actually removed from the store were then of about the value of six thousand dollars. Kountze caused these goods to be attached as the property of Scott Brothers, on the ground that the sale from Walter Scott to Cook was made for the purpose of fraudulently hindering and delaying the former's creditors. The district court dissolved the attachment, and its judgment was affirmed by this court: *Kountze v. Scott*, 52 Neb. 460. Cook brought the suit at bar in the district court of Gage county, against the sheriff thereof and the sureties on his official bond, to recover the damages which he alleged he had sustained by reason of the closing up of his place of business, the depreciation in value of the goods removed from the store while in the sheriff's hands, and for the loss of profits which he had sustained by reason of the interruption of his business. Cook had a verdict and judgment, and the sheriff and his sureties have brought the same here for review on error.

74 1. The first argument is, that the court erred in permitting Cook to testify on the trial that he had been injured in his credit, and had been refused credit by certain wholesale houses by reason of the attachment of his goods. The argument is, that the allegations of the petition were not such as to justify the admission of such evidence. The petition, among other things, alleged: "And that plaintiff enjoyed among the wholesale houses, business men, and manufacturers throughout the country a high and first-class credit, and was thereby enabled to do, and was doing, a large, prosperous, and profitable business. . . . And plaintiff further alleges that the said defendant, Robert Kyd, as such sheriff, and under said writ of attachment, then and there levied upon and took into his possession, carried away from plaintiff's said place of business, and converted to his own use, all of the said furniture, goods, wares, and merchandise set forth and mentioned in Exhibit B, the same being of the value of six thousand dollars, and then and there forcibly and wrongfully closed up the plaintiff's store and locked the same, and kept the same closed up and locked and remained in possession thereof for the period of ten days, and thereby broke up, damaged, injured, and destroyed plaintiff's business and plaintiff's credit, by reason whereof the plaintiff has been damaged in the sum of \$——." In support of their contention counsel for plaintiffs in error have cited us, among other cases, to the following: *Geisler v. Brown*, 6 Neb. 254; *Cook v. Cook*, 100 Mass. 194; *Bassell v. Ellmore*, 48 N. Y. 561; *Tobias v. Harland*, 4 Wend. 537; *Stiebeling v. Lockhaus*, 21 Hun, 457. Without

reviewing these authorities, however, or any of them, we do not think they are in point. It is said by counsel that loss of credit is a special damage, which must be specially pleaded in order to be proved. This may be safely conceded, but we think it is here sufficiently specifically pleaded. Again, it is insisted that the petition should allege how and by what means the plaintiff was injured in his loss of credit. We ⁷⁵ think he has sufficiently done that. He specifically alleges that his credit was injured and destroyed because of the fact that the sheriff attached and removed his furniture and locked up and closed his place of business.

It seems also to be the contention of counsel that, in order to make the petition, in the respect under consideration, good, it should have set out the names of the persons who refused the plaintiff credit. We do not think the petition was demurrable because of that omission. If the defendants desired a more specific and detailed statement as to what credits the plaintiff enjoyed before the attachment suit, and of what credits the attachment and seizure of his property had deprived him, they should have made application to the district court for a rule upon the plaintiff to make his petition more specific in that respect: *Haverly v. Elliott*, 39 Neb. 201. We think the petition in the respect under consideration states the ultimate facts in ordinary and concise language as required by section 92 of the Code of Civil Procedure. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674, was a suit similar to the one at bar. The declaration in the case alleged that by the attachment of his property plaintiff's business had been broken up, and his credit and reputation impaired and destroyed, and it was held that these averments were broad enough to admit evidence of all damage sustained by plaintiff in consequence of the wrongful attachment, including his loss of character, credit, and business.

2. Another argument is, that loss of credit was not a proper element of Cook's damages; that this element was too remote and speculative for consideration. This is simply saying that the wrongful destruction or injury of a merchant's credit is one for which the law affords no redress. We cannot subscribe to this doctrine. A man's financial standing or credit may not be "property," within the technical meaning of that term, but it is something often more valuable; and, if it be wrongfully injured or destroyed by another, he may recover whatever ⁷⁶ pecuniary damages he can prove, by competent testimony under proper pleadings, he has sustained thereby: *Meyer v. Fagan*, 34

Neb. 185; *Lewis v. Taylor* (Tex. Civ. App., Nov. 29, 1893), 24 S. W. Rep. 92; *Hangen v. Hachemeister*, 114 N. Y. 566, 11 Am. St. Rep. 691; *Haverly v. Elliott*, 39 Neb. 201.

3. It is next insisted that the court erred in permitting Cook to introduce evidence in reference to profits lost by him by reason of the attachment of his goods, and the closing up of his place of business. It is contended under this heading that the court permitted Cook to introduce testimony to show loss of profits sustained by him in conducting the business after the goods were returned to him. We do not so understand the record. It is as follows:

Q. What effect did it—that is, the closing up of the store, attaching and removing the goods—have on your business after the time the goods were returned? A. Well, we done some business by marking those goods down about thirty-five per cent. We were able to sell some of them, but the best part of the year had gone for trade.

Q. Well, were you able to sell those goods after you got them back; and if so, by what means, and at what prices? A. Why, I was able to sell some by selling them at considerable less than the cost of them.

Q. Now, during the ten days the sheriff was in possession, and your store was closed, what effect did that have on your business? A. Why, it completely stopped our business.

Q. Well, now you may state what the effect of shutting up this store for ten days, and then taking all those goods out for two or three months, was upon Mr. Cook's business down there. A. It broke it up. People did not know he was in business afterward for months.

It will thus be seen that this evidence was directed to the inquiry as to what effect the locking up of the store ⁷⁷ for ten days, and the removing of the goods for three months, had upon Cook's business. And, though the question was propounded as to what effect that transaction had on the business after the time the goods were returned, the witness evidently understood the question to refer to what effect the locking up of the store and removing of the goods had upon the business, and as to how that business was affected by the return of the goods, because he answered that, as the best part of the year for trade had gone, they were still able to sell some of the goods returned by marking them down. We do not think the object or effect of this evidence was to show profits lost by Cook in conducting his business after the return to him of the attached goods.

Another contention under this heading is that the district court erred in admitting in evidence the proofs offered by Cook to show the loss of profit sustained by him in consequence of the attachment and removal of his goods, and the locking up of his store. The store was absolutely closed from the 23d of October for ten days. The attached goods, comprising nearly all of his stock, were held by the sheriff from the time they were attached for some three months. The court permitted Cook to show the amount of sales and the profits made by him in this business during the corresponding period of the previous year—that is from October in one year until January in the next—as a basis for estimating his loss of profits; that by reason of the attachment of his goods and the knowledge thereof that had been bruited abroad, he was unable to purchase goods on credit from persons with whom he had been previously dealing in order to carry on the business. We think this testimony was all competent. It furnished a reasonably safe basis for determining whether Cook had been deprived of profits by this attachment proceeding and the amount of such profits. The measure of Cook's damages was all the loss he had sustained as the result of this wrongful attachment. If the goods, when returned, were worth ⁷⁸ less than when they were seized, the amount of that depreciation was one element of damages. If Cook's reputation and credit as a merchant were injured by this wrongful attachment, this injury was another element of his damages. If, by reason of the locking up of his store and the attachment of his goods, Cook's business was interrupted, and he was thereby deprived of profits which he would have made had the business not been interrupted, this loss of profits was another element of his damages; and, if the plaintiffs in error cannot be made to respond to Cook for all the damages which he sustained as the result of this wrongful attachment, it is not because of the fact that under the law Cook is not entitled to these damages, but because of the inability of the courts to formulate any reasonably certain rule for their admeasurement: *Schile v. Brokhahus*, 80 N. Y. 614; *Goebel v. Hough*, 26 Minn. 252; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 349 [318], 70 Am. Dec. 479; *Schars v. Barnd*, 27 Neb. 94; *Haverly v. Elliott*, 39 Neb. 201; *Western Union Tel. Co. v. Wilhelm*, 48 Neb. 910.

Counsel for plaintiffs in error criticise somewhat the doctrine of this court making loss of profits in cases like the one at bar an element of damages. We think, however, the doctrine is a just and a reasonable one, and one enforced by the courts gen-

erally. We think that a loss of profits is a result which may be reasonably, naturally, and ordinarily expected to follow from the closing up of a merchant's place of business, and the seizure of his goods; and where an officer holding a writ of attachment directed against A and his property closes up the place of business and seizes the goods in the possession of, and claimed to be owned by, B, when called upon to make good B's damages he ought not to complain because the court includes in such damages the loss of profits sustained by B because of the seizure of his goods and the interruption of his business.

4. Another argument is as follows: "The court erred in failing to instruct the jury specifically and definitely ⁷⁰ as to the manner in which they should estimate the damages as to the loss of business credits, profits, et cetera." The court instructed the jury: "The court instructs the jury, in case they find for the plaintiff, that, in determining the amount of damages which the plaintiff is entitled to recover, they are to consider not only the amount, if any, which the evidence in this case shows the goods in question were damaged while in possession of the sheriff, but also the actual loss, if any, which the evidence in the case shows the plaintiff sustained by reason of the suspension of business during the time he was prevented from carrying it on, by reason of the acts of the sheriff, if the jury believe from the evidence in the case that plaintiff was prevented from carrying on his business by the acts of the sheriff." The complaint is, that the court nowhere in its instructions to the jury specifically told them what method they should pursue in estimating or arriving at or determining the damages which the plaintiff had sustained. But we think that the instruction quoted was specific and definite enough. It limited Cook's right to damages to the depreciation in value of the property seized, and the loss he had sustained by reason of the locking up of his store and the interruption of his business; and the jury, if it awarded Cook any damages by reason of the suspension of his business, were bound to base such an award upon the evidence. What manner or method the jury should pursue in estimating the amount of Cook's damages by reason of the suspension of his business was by the court left to the jury to determine. If this was unsatisfactory to the defendants below, they should have prepared and submitted to the court, with a request that it be given, an instruction prescribing the method which the jury should pursue in estimating the amount of the damages sustained by Cook by reason of the interruption of his business:

Gran v. Houston, 45 Neb. 813. The court was bound to instruct the jury, whether requested or not, upon the material issues of the case. This it did, and correctly instructed the jury ⁸⁰ as to the plaintiff's measure of damages. But the court was not obliged—if it was authorized to formulate—to prescribe a method of computation which the jury should pursue in estimating the plaintiff's damages.

5. As already stated, George R. Scott and Walter W. Scott, as copartners, at one time owned the stock of furniture in controversy. George R. Scott sold his interest in the business to Walter W. Scott, and subsequently Walter W. Scott sold the entire business to Cook, the plaintiff below. One of the defenses interposed to this action by plaintiffs in error was that the sale from George R. Scott to Walter was made with a fraudulent purpose on the part of both of them to defraud their creditors; that the sale from Walter Scott to Cook was made with a fraudulent purpose on the part of both of those parties to defraud the creditors of Scott Brothers. On the trial, certain declarations and admissions made by Walter Scott subsequent to the sale of the property to Cook, to the effect that the sale from him to Cook was fraudulent, were admitted in evidence by the court; and the plaintiffs in error also sought on the trial to introduce in evidence certain declarations made by George R. Scott subsequent to the sale from himself to Walter, to the effect that that transaction was fraudulent. These declarations the court excluded, and this is the next ruling complained of. The district court was correct. Walter Scott was the vendor of Cook, and his declarations in disparagement of the title to the property, had he been in the actual possession thereof, were admissible as part of the *res gestae*; and, though he was not in possession of the property, his declarations as to the intent with which the conveyance to Cook was made were admissible for the purpose of showing the intent with which he made the conveyance, although not for the purpose of establishing Cook's intent in accepting the conveyance, or for the purpose of disparaging Cook's title to the property: *McDonald v. Bowman*, 40 Neb. 269. But George R. Scott was the vendor of Cook's vendor. He was not in possession of the furniture when it was attached. He was not ⁸¹ Cook's vendor, and therefore his declarations were mere hearsay, and inadmissible. The general rule is, that the declarations of a vendor made after the conveyance which tend to disparage the title of the vendee are not admissible in evidence. But the courts have formulated an exception to this rule in cases

where the conveyance is assailed as fraudulent. In such cases the declaration of the vendor made after the conveyance and while in the actual possession of the property concerning the objects, intents, and purposes of the conveyance, have been held admissible as *res gestae*. In *McDonald v. Bowman*, 40 Neb. 269, and in *Sloan v. Coburn*, 26 Neb. 607, it was held that the declarations of a vendor made after the conveyance, as to the objects, purpose, and intent of the conveyance, in a suit in which the deed was assailed as fraudulent, were admissible in evidence, though such vendor at the time the admissions were made was not in possession of the property. But the declarations were held admissible in evidence on the ground that they tended to show the intent with which he made the conveyance, although they were not competent evidence as tending to show the intent of the vendee in accepting the conveyance. The answer of the defendants below does not allege that Cook had any knowledge of, or participated in, the alleged fraudulent conveyance from George R. Scott to Walter W. Scott; and as George R. Scott was not Cook's vendor, and was not in possession of the goods when attached, his declarations or admissions in reference to the object and purpose of the conveyance made by him to Walter or by Walter to Cook were incompetent, immaterial, and hearsay.

6. It is also insisted that the verdict is not sustained by the evidence, and that the damages awarded by the jury are excessive, appearing to be the result of passion and prejudice. We do not think that either of these contentions is tenable. The record contains no prejudicial error. The judgment of the district court must be and is affirmed.

ATTACHMENT—WRONGFUL—MEASURE OF DAMAGES.—A person whose property has been wrongfully or illegally attached is entitled to recover the actual damages proved to have resulted therefrom: Monographic note to *Tisdale v. Major*, 68 Am. St. Rep. 268.

ATTACHMENT—WRONGFUL—LOSS OF PROFITS—INJURY TO CREDIT.—Although the authorities are in conflict, the general rule is, that in actions to recover for a merely wrongful attachment, where only actual damages can be allowed, injury to credit and loss of prospective profits in business are not an element of damages, and cannot be recovered, because too remote: Monographic note to *Tisdale v. Major*, 68 Am. St. Rep. 272, where the cases on both sides of the question are collected. See, also, the extended note to *Burton v. Knapp*, 81 Am. Dec. 474.

ATTACHMENT—WRONGFUL—DAMAGES FROM LOSS OF TRADE cannot be considered the proximate result of a levy on a

small portion of a stock of goods, if the attachment defendant continues business: Monographic note to *Tisdale v. Major*, 68 Am. St. Rep. 270.

ATTACHMENT—WRONGFUL—DEPRECIATION IN VALUE OF REAL ESTATE.—An attaching creditor is not liable for the depreciation in value of real estate levied upon, which occurs while the attachment is in force, provided there is no change of possession: *Tisdale v. Major*, 106 Iowa, 1, 68 Am. St. Rep. 263. Depreciation in value of the property by reason of the seizure is generally an element of damage: Note to *Burton v. Knapp*, 81 Am. Dec. 473.

INSTRUCTIONS—DUTY OF COURT.—The general rule is, that a court is not bound to instruct the jury, unless required by one party or the other to do so. It is the better practice, however, for a judge in all cases to give the jury a knowledge of the definitions and principles of law applicable to the case: Monographic note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 118.

EVIDENCE—RES GESTAE—DECLARATIONS OF VENDOR. If a vendor, with the consent of the vendee, remains in possession of personal property after a sale, and the creditors of the vendor attack the sale as fraudulent, the declarations of the vendor while thus in possession are admissible in evidence against the vendee, as part of the *res gestae*, to characterize the possession: *Lehmann v. Chapel*, 70 Minn. 496, 68 Am. St. Rep. 550, and note. But declarations of a vendor made after he has transferred property are not admissible, as against his transferee, to impeach the transfer: *Welcome v. Mitchell*, 81 Wis. 566, 29 Am. St. Rep. 913, and note.

OLSON v. LAMB.

[56 NEBRASKA, 104.]

JUDICIAL SALES—PURCHASE BY ATTORNEY.—A purchase of property by an attorney at a judicial sale in which his client is interested is against public policy, and the client may elect to treat him as a trustee; but if the client afterward deals with the attorney as the owner of the property he thereby ratifies the purchase and is estopped from claiming the benefit thereof.

JUDICIAL SALES PURCHASE BY ATTORNEY—RATIFICATION.—If an attorney, who has purchased property at a judicial sale in which his client is interested, conceals from such client material facts which might affect the latter's election to treat the attorney as a trustee, dealings between them on the basis of the attorney's ownership, the client being in ignorance of the facts, does not prevent him, upon learning of such facts, from enforcing the trust.

JUDICIAL SALES CONTRACT AS TO BIDS.—A contract between two persons, whereby one of them is to bid at a judicial sale and subsequently handle the property on behalf of both, is valid, and does not vitiate the sale, when the effect is not to chill bids nor prevent competition, but to enable persons to compete, when without combining they cannot do so.

JUDICIAL SALES—PURCHASE BY ATTORNEY—REIMBURSEMENT.—An attorney who purchases property at judicial sale in which his client is interested is entitled to recover only the amount he paid at such sale.

ATTORNEY AND CLIENT—PURCHASE OF JUDGMENT BY ATTORNEY.—An attorney who purchases judgments against his client at a discount cannot reap an advantage therefrom. Such purchase operates for the benefit of the client, and the attorney is entitled only to the amount he paid for the judgments.

TRUSTS—CONSTRUCTIVE TRUSTEE—REIMBURSEMENT.—A constructive trustee may be allowed to recover reimbursement when the circumstances raising the trust are not directly the result of fraud.

TRUSTS—CONSTRUCTIVE TRUSTEE—COMPENSATION. A constructive trustee, who is charged with rents, is entitled to recover his reasonable expenditures and reasonable compensation for managing the property.

JUDICIAL SALES—PURCHASE BY ATTORNEY—TRUSTS—COMPENSATION.—An attorney who purchases property for his own benefit at a judicial sale in which his client is interested cannot, on a suit to declare him a trustee, be allowed compensation for professional services in procuring the sale to be confirmed.

SETOFF—PARTNERSHIP.—A claim owing to a partnership cannot be set off against debts owing to a member of such partnership individually.

Ricketts & Wilson, for the appellants.

Lamb, Adams & Scott, for the appellees.

¹⁰⁹ **IRVINE, C.** This action was brought by Charles J. Olson against Walter J. Lamb and his wife, for the purpose of having a trust declared in favor of plaintiff in certain property alleged to have been bought by Lamb at judicial sale while he was acting as attorney for plaintiff. The Prentice Brownstone Company was made a party defendant, and by cross-petition alleged that Lamb was also its attorney ¹¹⁰ in the foreclosure case resulting in the judicial sale, and it prayed that a trust be declared and conveyance ordered. Both the petition and cross-petition originally offered as a condition of the conveyance to reimburse Lamb for his expenses. After the coming in of an answer in which Lamb, among other things, pleaded the agreement under which the sale was made, hereinafter more particularly referred to, the plaintiff and the cross-petitioner amended their respective pleadings, withdrawing their offer to redeem and demanding a conveyance without submitting to redemption. From the decree rendered appeals were taken by all parties. The appeal of Lamb raises, among other things, the question of the propriety of permitting the case to proceed on the amended petitions. The district court had, however, by its decree, required Olson to redeem, and had denied to the Prentice Brownstone Company any relief whatever, so that we cannot see how the propriety of the amendment becomes a material consideration.

Preliminary to the consideration of the merits of the case a statement of the somewhat complicated facts involved becomes necessary. In this statement we shall endeavor to omit, for the sake of brevity and clearness, nonessentials and the less important details. Their omission from the statement, however, is no indication that they have been overlooked in considering the case. In 1892, Mr. Howell was the owner of a certain lot in the city of Lincoln, and undertook the construction thereon of a building described in the record as the "Conservatory of Music." He made a contract with Olson for the stone and brick work on the building, and Olson began the performance of the work, purchasing material from several different persons to whom he became indebted therefor. After the work had progressed to a considerable extent, but before the building was under roof, it became evident that Howell was unable to proceed, and the decree on sufficient evidence finds that he was wholly insolvent. Mr. Lamb was then a member of the law firm ¹¹¹ of Lamb, Ricketts & Wilson, and Mr. Olson consulted him with reference to his interests. Mr. Olson introduced to Mr. Lamb the agent of the Prentice Brownstone Company, to which Olson was indebted for stone furnished for the erection of the building. Mechanics' liens were perfected both by Olson and the stone company, and a suit to foreclose the liens was begun by the stone company. About this time the firm of Lamb, Ricketts & Wilson was dissolved. The evidence indicates that business intrusted to it before the dissolution was carried on by one or another of the members of the late firm on behalf of the old firm. The business of Olson and the stone company was in part conducted by Mr. Wilson, but the evidence amply sustains the finding that Mr. Lamb remained the attorney of both parties until after the sale in controversy. There was on the property, at the time the liens accrued, a mortgage to the Nebraska Savings Bank of about \$6,000. For the purpose of enabling Howell to obtain a further loan Olson had consented that another mortgage be made which should have priority over any lien of his, and consequently the Savings Bank had made another mortgage loan of about \$2,500. The materialmen we have here to consider had not, however, waived their rights. Consequently, when the decree was rendered in the foreclosure case it established the original mortgage as a first lien, a certain judgment which does not figure in the case as a second lien, then the liens of certain materialmen as a third class of liens. Of these the Brownstone Company had one for \$1,121.35, Henry M. Leavitt

\$1,673.43, L. K. Holmes \$970.87. Olson was individually liable for these debts. As the fourth lien the second mortgage of the Savings Bank was established. Olson's lien followed as the fifth lien, and amounted to \$3,708.36. This decree was rendered June 30, 1893, and within due time Howell filed a request for a stay, which would operate, of course, to stay the sale on the mortgage debts. Then began a long series of negotiations for the purpose of forming a plan for purchasing ¹¹² the property. The evidence shows that from the time the decree was rendered until February, 1894, when the sale was had, was a period of business depression and financial stringency, and that the task of raising money sufficient to buy the property at a price protecting the mechanics' liens was, to say the least, arduous. The details of these negotiations are only important in so far as they show how Lamb has become interested personally in the litigation. The first plan was to sell the property subject to the first mortgage, while the execution of the decree, in so far as it foreclosed that mortgage, was suspended by the stay. It was proposed that the lienors, or some of them, should buy the property and Olson should proceed with the building until it should be inclosed, and so put in condition that a loan could be negotiated which might take care of the mortgages. This plan was defeated by Howell's withdrawing his stay. The Savings Bank mortgages had by this time been assigned to one Miller as trustee for certain associated banks in Lincoln which had lent money to the Savings Bank to tide it through difficulties. When the stay was withdrawn these banks stood ready to buy in the property to protect their mortgages. This they could safely do, unless there were other bidders, at the lowest price for which the property could be bought. In this state of affairs Mr. Lamb undertook to arrange a plan by which the lien owners should advance money to make a bid on the property sufficient to protect them. Olson proposed to raise about \$3,000 for this purpose, and there is evidence that Mr. Lamb offered to assist him in so doing. The stone company, through some of its agents, promised to do its part. Mr. Leavitt was, however, unable to raise his portion, and at this juncture Mr. Lamb bought the Leavitt lien himself, at a discount of about \$100. The court found on sufficient evidence that Lamb made this purchase without the knowledge or consent of Olson or of the stone company. It is clear, however, that they soon after learned of it and acquiesced therein, but they ¹¹³ were not informed that it had been purchased at a discount, and did not

learn that fact until long after the sale. The stone company afterward refused to advance any money. Its officers stated that no agent had authority to agree so to do. The property went to sale without any arrangement being consummated and was bid in by R. D. Muir, who had become the owner of the Holmes lien, for \$970.87. Motions to set aside the sale were filed by Olson, the stone company, and by Lamb as owner of the Leavitt lien. In connection with the motions Olson offered, in case of a resale, to bid \$8,500, and Lamb pledged himself to bid \$8,000. The proof shows that Olson was not at that time responsible for such a bid, but Mr. Lamb was of ample financial responsibility. The court set aside the sale, and negotiations were renewed for acquiring the property on behalf of the lienors. Of these it is sufficient to say that no result was reached and that the stone company refused to take any part in the purchase. As the time of sale approached, Mr. Lamb, in view of his bid of \$8,000, made arrangements to borrow \$10,000 on the security of real estate by him owned. The arrangements had been perfected but the money had not reached him on February 6, 1894, when the second sale took place. He had on that day only about \$150 to his credit in the bank. Mr. Muir, having the Holmes lien to protect, was able to temporarily command the use of a considerable sum, but could not safely buy unless he could almost immediately dispose of the property and repossess himself of the money. Within a few hours of the time of the sale Muir and Lamb entered into a contract whereby Muir was to bid upon the property and continue to bid until Lamb should indicate that he should stop. If he should get the property under his bid he might within ten days sell it by paying to Lamb the amount of the Leavitt lien. If he should fail to so dispose of it, he was to convey it to Lamb, on Lamb's paying him the amount of his bid and \$500 additional, in which event Muir was to assign to Lamb the Holmes ¹¹⁴ lien, which seems to have been a personal judgment against Olson. When the property was offered, Miller, on behalf of the banks, bid \$7,000; Muir bid \$7,001, and the property was sold to him. Muir failed to dispose of the property, and, Lamb's money arriving, he paid Muir the amount of his bid, either directly or by paying the money to the sheriff and taking up a certified check which Muir had deposited. The sale was confirmed, the sheriff's deed to Muir was delivered to Lamb, and Lamb at once caused to be recorded both that deed and a conveyance from Muir to him.

After the title was thus perfected in Lamb, he made a contract with Olson whereby Olson undertook to perform the labor necessary to complete the building according to certain designs which Lamb had made to fit it for a different purpose. By this contract Lamb's ownership of the Leavitt and Holmes judgments was recited, and, allowing certain deductions, their net amount was fixed at \$2,500. Lamb agreed to pay Olson certain specified rates for labor performed on the building, and on completion of the work to release the judgments. This contract was carried out. The stone company had shipped a quantity of stone which was not inwrought in the building prior to the foreclosure. In completing the building Lamb bought this stone and the stone company received pay from him therefor, knowing that he had become the owner of the property. Soon after the building was completed this suit was brought.

It will be convenient to consider first the case of Olson and then that of the stone company. The position of Olson is that Lamb, as his attorney, could not, without his consent, buy the property for himself; that Lamb was guilty moreover of actual fraud which had a double effect: 1. To relieve Olson from any estoppel which might arise by reason of his dealing with Lamb as the owner; and 2. To deprive Lamb of all right to compensation or reimbursement. That an attorney cannot himself purchase at judicial sale the property in litigation ¹¹⁵ in which his client is concerned, and hold it to his own use without the consent of his client, is an elementary principle. If he so purchase, the client may, at his election, treat him as a trustee and enforce the trust. Motives are immaterial, and it is also immaterial whether the client actually lost or gained by the transaction. Such a purchase is contrary to public policy. In support of this rule there is a multitude of authorities, some of which may be found in 3 American and English Encyclopedia of Law, 340. It therefore results that from the fact of the relationship of attorney and client alone, Olson had a right to the benefit of Lamb's purchase, and could enforce the trust unless he had first consented to the purchase, or afterward, by word or conduct, elected and permitted Lamb to retain the property. Ordinarily, undoubtedly his contracting with Lamb after the purchase, knowing him to be the owner, to finish the building for Lamb's benefit, and so encouraging Lamb to expend money in permanent improvements, would bind Olson both as an election and by estoppel. The facts which it is claimed relieve Olson from these consequences, be-

ing those which it is asserted amount to actual fraud, are so complicated with the question of Lamb's right to reimbursement that the two questions can properly be considered together. We cannot see that the contract with Muir for the purchase of the property was fraudulent or that it was against public policy. It was not, as asserted, an arrangement to chill bids, nor did it seek to prevent anyone from bidding, as was the case in *Goble v. O'Connor*, 43 Neb. 49. The situation was this: Lamb was able to buy the property but did not possess cash on the day of sale sufficient to permit him then to bid. Muir, on the contrary, had an arrangement for the temporary use of sufficient money to enable him to bid, but the necessity of repaying that money within a short time was such that he could not buy without some assurance that the purchase would be taken off his hands. The contract then was an arrangement between two men, neither of whom could bid alone, ¹¹⁶ but by whom a single bid might be made if they acted in concert, and the case is in this respect in line with *Gulick v. Webb*, 41 Neb. 706, 43 Am. St. Rep. 720, where it was held that, where the object is not to prevent competition or chill bids, but to enable parties to compete where, without combining, they could not do so, the transaction will be upheld. The remaining facts applicable to this branch of the case are the concealment of this contract from Lamb's clients, the concealment of the fact that Lamb had become the owner of the Leavitt and Holmes judgments for less than their face value, and a fact in connection with the confirmation of the sale which has not yet been stated. So far as Olson is concerned, it is clear that he did not know the price at which Lamb bought the Holmes and Leavitt liens; and, while he knew that Lamb had become the owner of the property soon after the sale, he did not know the nature of the contract by which that ownership was acquired. In view of the duties imposed by law upon an attorney, the failure of Lamb to disclose to Olson these facts must be treated as an unlawful concealment thereof. The other circumstance which has been adverted to was that Howell had opposed the confirmation of the sale on the ground that it had been made for \$7,001 in the face of Lamb's offer to pay \$8,000. For the purpose of curing this defect, Lamb entered a remittitur of \$1,000 on the Leavitt lien, and it was due to this remittitur that the sale was confirmed. Olson did not know of this remittitur until after his subsequent contract with Lamb had been carried out. We think that Lamb's concealment of these facts from Olson was entirely suffi-

cient to relieve Olson from the effect which would otherwise attach to his conduct in afterward dealing with Lamb. An attorney who purchases judgments against his client at a discount cannot be permitted to reap an advantage therefrom. Such a purchase operates for the benefit of the client, and the attorney is entitled only to the amount he paid for the judgments: *Larey v. Baker*, 86 Ga. 468; *Sutherland v. Reeve*, 151 Ill. ¹¹⁷ 384. The remittitur of \$1,000 from the Leavitt judgment of course reduced the judgment both as a lien on the property and as a personal obligation of Olson. Olson was therefore indebted on these judgments much less than he supposed. The difference amounted to about \$470 on the Holmes judgment and to \$1,100 on the Leavitt judgment. Had he known this fact, he undoubtedly would not have made the contract with Lamb in the manner in which it was made, adjusting the amount of his debt at \$2,500, when in fact it was only about \$1,000. Moreover, had he known the terms of the contract between Muir and Lamb, he would have known or could have learned that Lamb stood in the attitude of the purchaser at the sale and could be treated as a trustee. Without such knowledge Lamb appeared in the attitude of a subsequent purchaser from Muir. But while these facts, by relieving Olson of his election and of the estoppel, retained in him a right to redeem, we do not think that they deprive Lamb of the right to reimbursement. The sale itself was not actually fraudulent. It was simply against public policy and raised a constructive trust. In every case of this character which we have observed, the purchasing attorney has been protected in his disbursement, even where he has been deprived of compensation for his services. The other facts were not inherent in the sale or so connected with it as to taint the purchase with actual fraud. In the accounting Olson can properly be compensated for any loss sustained by him in consequence of the concealment practiced upon him by Lamb, but such concealment was undoubtedly a material inducement to the subsequent contract, and should be given the effect of releasing Olson from these obligations, including the settlement effected thereunder. On the other hand, we think the contention of Mr. Lamb is sound, that if Olson be released from the terms of that contract affecting him, Lamb should also be released from its other terms. Lamb agreed to pay the price he did for the work in view of the adjustment of Olson's debt ¹¹⁸ to him at \$2,500. The settlement thereby effected not being binding on Olson, the adjustment should be

made, not according to the contract, but on the basis of what Olson's labor was reasonably worth in completing the building.

In this connection we may here dispose of certain other features of the accounting had. The court allowed Lamb \$300 for services in procuring the confirmation of the sale. We must regard this as an unwarranted allowance. The sale was on such terms that Olson was entirely uninterested in its confirmation, and it was evident that Lamb performed these services on his own behalf. We know of no rule which permits an attorney endeavoring to purchase for himself to receive compensation from his client for his efforts in so doing. The decree also includes as an allowance to Lamb \$500 for his services in the foreclosure case. These services were rendered on behalf of the firm of Lamb, Ricketts & Wilson and are not a proper setoff in a suit against one member of the firm. Another item allowed Lamb was \$750 for services in superintending the building. We think the rule is, that even a constructive trustee is entitled to compensation for managing property where he is chargeable with the rents. The decree charges Lamb with the income from the property; and taxes and other expenses, including a reasonable compensation for management, should in equity be deducted from the amount so allowed.

The accounting, in order to ascertain the amount required to redeem, proceeded in several particulars on a false basis, and we have not findings in all respects sufficient to enable us to restate the account. As to Olson, the case must be reversed and remanded, with directions to the trial court to retake the account, allowing to Olson the benefit of the discounts at which Lamb purchased the liens, including the \$1,000 remittitur, and to allow him also the reasonable value of his work under the contract to complete the building, to charge Lamb with rents. On the other hand, Lamb should be credited with ¹¹⁹ his actual disbursements in buying the property, in completing the building, and in managing the same. He should be allowed nothing for legal services, but receive a reasonable compensation for superintending and managing the property after he acquired title.

We now reach the case of the Prentice Brownstone Company, and what has already been stated applies in great measure to this branch of the case. The stone company positively refused to buy the property or to advance any money for the purpose of purchasing it or protecting its lien. The day after the sale an agent of the company was in Lincoln, and what occurred is

somewhat in dispute. It is very evident that Mr. Lamb told the agent that by some means they were still in position to take the property and protect themselves. According to Lamb, the statement was that "he had kept a string to it." It is equally clear that the nature of this "string" was not disclosed, and that the company did not know that Lamb was, in effect, the purchaser. The company again peremptorily refused to take any steps. Here again, by this action and by the company's subsequently selling stone to Lamb to complete the building, knowing that Lamb claimed it as his own, there would be an election allowing him to take the property; but the force of this election was avoided, in the first place, by Lamb's concealing the fact that he was the purchaser and could, therefore, be treated as a trustee. Moreover, the company's rights were unjustly affected by other facts of which it then had no knowledge and of which it did not acquire knowledge until after the building was completed. The bid of \$7,001 was just about sufficient to discharge the liens prior to the first group of mechanics' liens, one of which was held by the stone company. The company did not know that the amount of the other liens in this class had been reduced by Lamb's purchase thereof at a discount, nor did it know that the terms of the sale were such as to provide in whole or in part for the discharge of the other liens in the same class, to the ¹²⁰entire exclusion of the lien of the stone company. Then, when the sale was confirmed, Lamb's remittitur of \$1,000 upon the Leavitt lien was to make good his offer to pay \$8,000. Had he paid \$8,000, the stone company would have received its proportionate part thereof as one of the third class of lienors. By paying only \$7,001 and remitting \$1,000 on the Leavitt lien, Lamb, in effect, paid the whole of the excess of his offer above \$7,001 to himself to apply on the Leavitt lien entirely excluding the stone company, which stood in equal priority. Such a transaction cannot for a minute be tolerated. The stone company must also be permitted to redeem. In adjusting its account, it should be allowed credit for such portion of this \$1,000 as it would have been apportioned had the bid been that much higher and no remittitur entered. It should also be given the benefit of the discounts on the two liens.

Finally, the court erred in entering a judgment absolute against Lamb for the amount which he obtained by these discounts and by the remittitur, and then calculating the amount required from Olson to redeem at the full sum. This would

require Olson to pay the whole amount and recover part back on his judgment. The amount owing Olson from Lamb should be deducted in ascertaining the amount required to redeem, and any judgment against Lamb should be effective only in case of Olson's failure to redeem.

The judgment is reversed and the case remanded with directions to proceed in accordance with this opinion.

PURCHASE BY ATTORNEY.—An attorney at law is forbidden to purchase an interest in the thing in controversy adverse to his client: *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257; *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401.

JUDICIAL SALES—PURCHASE BY ATTORNEY.—A purchase by an attorney of land of his client, under an execution sale, will pass to the interests of his client. If the client wishes to take advantage of such a purchase, he must do so within a reasonable time: *Note to Cunningham v. Jones*, 1 Am. St. Rep. 260. Where an attorney for two plaintiffs in an execution purchases land sold under execution at a price less than the amount of the claim, for the benefit of one of the plaintiffs, and takes the deed in his name, without the consent of the other plaintiff, the purchase will be deemed to have been made in trust for both plaintiffs: *Leisenring v. Black*, 5 Watts, 303, 30 Am. Dec. 322. An attorney for a plaintiff in execution, purchasing property sold under execution, contrary to the plaintiff's orders, is responsible for the amount of the judgment under which the property was sold: *Fisher v. Knox*, 13 Pa. St. 622, 53 Am. Dec. 503.

JUDICIAL SALES.—AN AGREEMENT TO MAKE A JOINT BID at a judicial sale, although it may indirectly have the effect of keeping others from bidding, is not illegal unless it is intended to avoid competition: *Gulick v. Webb*, 41 Neb. 706, 43 Am. St. Rep. 720, and note.

TRUSTS.—A TRUSTEE'S COMPENSATION may be increased, diminished, or withheld altogether, according to the circumstances of each case, in the sound discretion of the court: *Gibson's case*, 1 Bland, 138, 17 Am. Dec. 257, and note.

SETOFF—PARTNERSHIP.—In an action on a bill of exchange brought by an indorsee against the drawer, a demand due from the payee to a partnership of which the defendant is a member, if available as a setoff in any case, is not so available unless it is made to appear that the other partners gave their consent to such use of the claim before the assignment of it to the defendant, and that the plaintiff had knowledge of their consent: *Manning v. Maroney*, 87 Ala. 563, 13 Am. St. Rep. 67; *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38.

CENTRAL INVESTMENT COMPANY v. MILES.

[56 NEBRASKA, 272.]

GUARANTY—LIABILITY OF GUARANTOR FOR COLLECTION.—A mere guarantor of the collection of a note is liable upon his guaranty only when it is shown that such note cannot be collected of the maker.

McCabe, Wood, McGilton & Elmer, for the appellant.

F. B. Tiffany, for the appellee.

273 RYAN, C. In the district court of Douglas county it was alleged by the plaintiff, the executor of J. L. Miles, and by James Thompson, that the defendant, the Central Investment Company, had sold, assigned, and delivered to said Miles and Thompson three promissory notes originally made to the Central Investment Company and indorsed upon each the following guaranty:

"We guaranty collection of the within note and waive notice of protest.

"CENTRAL INVESTMENT COMPANY,

"By M. S. Lindsay,

"President and Manager."

In the petition there were joined with the Central Investment Company, as defendants, the maker of said notes and three sureties thereon. The Central Investment Company demurred to the petition, and the district court on said demurrer held that the Central Investment Company could be sued as it was sued, notwithstanding the guaranty by it was merely of collection, and not of payment, and there was judgment accordingly. In *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447, the holdings of several courts are reviewed, with the conclusion, announced by Cooley, J., that a mere guarantor of collection could not, over his objections, be held liable jointly with the principal, even though it was alleged that the latter was insolvent, but the guaranty implied that the property of the maker should be exhausted before resort could be had to a guaranty of collection. In *Peck v. Frink*, 10 Iowa, 193, 74 Am. Dec. 384, it was held, where the payee of a note had transferred it by an indorsement of the form of that on which the Central Investment Company was held liable in this case, that, to render the guarantor liable on his guaranty, it was necessary to show that the note could not be collected of the maker. To the same

effect was *Dewey v. Clark Investment Co.*, 48 Minn. 130, 31 Am. St. Rep. 623. We think that rule is ²⁷⁴ sound, and, accordingly, the judgment of the district court is reversed.

GUARANTY—LIABILITY OF GUARANTOR FOR COLLECTION.—The distinction between a guaranty of payment and a guaranty of collection is, that the former is an absolute, unconditional undertaking on the part of the guarantor that the debtor will pay upon the maturity of the debt, while the latter is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor: Monographic note to *Fall v. Youmans*, 64 Am. St. Rep. 393-403, on the question of guaranty of collection.

WESTERN UNION TELEGRAPH COMPANY v. BEALS.

[56 NEBRASKA, 415.]

TELEGRAPH COMPANIES—LIABILITY FOR ERROR IN TRANSMITTING MESSAGE.—Under the Nebraska statute, a telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver messages received by it, notwithstanding a contrary agreement printed on its blanks.

TELEGRAPH COMPANIES—ERROR IN TRANSMISSION OF MESSAGE—NEGLIGENCE.—If a message as delivered to a telegraph company reads, "Attach property of A for seven hundred and ninety dollars," and the message as delivered reads, "Attach property of A for even hundred ninety dollars," the receiver of the message is not guilty of negligence in interpreting the amount as one hundred and ninety dollars, and the telegraph company is liable for all damages arising from its error in the message as delivered.

W. W. Morsman, for the appellant.

Macfarland & Altschuler, for the appellee.

⁴¹⁵ **RAGAN, C.** November 28, 1892, Beals, Torrey & Co., a copartnership doing business in Milwaukee, Wisconsin, by their ⁴¹⁶ attorneys, Winkler and others, delivered to the Western Union Telegraph Company a telegram for transmission and delivery to Alexander Altschuler, also attorney for Beals, Torrey & Co., at Ainsworth, Nebraska. The telegram, together with the printed matter upon the blank upon which it was written, was as follows:

"Send the following message subject to the terms on the back hereof, which are hereby agreed to.

"Milwaukee, Wis., Nov. 28, '92.

"To Alexander Altschuler, Ainsworth, Neb.: Attach property of Sargent & Co. favor of Elias S. Beals, Alexis Torrey, E. Frank

Beals, and James L. Beals, copartners doing business here as Beals, Torrey & Co. Claim for goods sold and delivered seven hundred ninety dollars. Claim not yet due. Ainsworth bank will furnish bond. Statement by mail.

"WINKLER, FLANDERS, SMITH, BOTTMUM & VILAS.

"Read the notice and agreement on back."

This notice and agreement was as follows:

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages, and this company is hereby made the agent of the sender, without liability, to forward any message ⁴¹⁷ over the lines of any other company, when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this company can be insured, by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz: One per cent for any distance not exceeding one thousand miles, and two per cent for any greater distance. No employé of the company is authorized to vary the foregoing.

(Signed) NORVIN GREEN,

"President,

"THOS. T. ECKERT,

"Gen. Mgr."

The telegram delivered to Altschuler at Ainsworth read: "Attach property, et cetera, even hundred ninety dollars." In pursuance of the telegram Altschuler caused the property of Sargent & Co. to be attached in favor of Beals, Torrey & Co. for one hundred and ninety dollars. In the district court of Brown county Beals, Torrey & Co. brought this suit against the telegraph company to recover the remainder of their claim against Sargent & Co., on the ground that the mistake of the

telegraph company in transmitting the dispatch caused the loss of said debt. Beals, Torrey & Co. had judgment, to review which the telegraph company has filed here a petition in error.

The first argument of the plaintiff in error is, that by the terms of the contract under which the message was transmitted, Beals, Torrey & Co.'s right of recovery was limited to the sum paid by them for transmitting the message. In support of this contention, counsel has cited us to a long array of cases which hold that a ⁴¹⁸ telegraph company has a right to make reasonable rules and regulations relative to sending messages, and thereby limit its liability for errors not occasioned by its negligence, and that the contract exempting the company from liability for damage for mistakes in transmitting an unrepeatd message is a reasonable and enforceable one. Among the cases cited is *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356, which sustains the argument of the plaintiff in error. This case was decided at the January, 1881, term of this court. The legislature which convened in this state in January, 1883, enacted what is now chapter 89 a of Compiled Statutes, section 12 of which chapter provides: "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks." After this statute went into force the question was again presented to this court whether a telegraph company which had made a mistake in transmitting a message was protected by the contract printed on the blank that it should not be liable for mistakes or delays in the transmission or delivery or nondelivery ⁴¹⁹ of any unrepeatd message beyond the amount received for sending same; and it was ruled that the company, by reason of the statute just quoted, was liable for all damages sustained by its failure to correctly transmit and deliver the message received by it, notwithstanding the clause, condition, or agreement on its printed blanks: *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363. To the same effect: *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 40 Am. St. Rep. 490, and *Western Union Tel. Co. v. Kemp*, 44 Neb. 194, 48 Am. St. Rep. 723. We think it clear beyond all controversy that the statute just quoted was enacted by the

legislature for the express purpose of obviating the effect of the decision of this court in *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356. The cases cited by counsel for the plaintiff in error, because of the provision of our own statute, cannot be regarded as authority by us in support of the telegraph company's contention. Not one of these cases, we think, was influenced by such a statute as the Nebraska statute, nor decided in a jurisdiction in which existed such a statute. It seems to be the contention of counsel for the telegraph company that the contract printed on the telegraphic blank does not attempt and was not intended to exempt the telegraph company from liability for the negligence of itself or its employes. We quote the argument of the eminent counsel in his brief:

"The primary and important question is, Is the contract under which the message was transmitted, providing, *inter alia*, that the company 'shall not be liable for mistakes . . . in the transmission . . . of any unrepeatd message beyond the amount received for sending the same,' valid? It is the contention of the plaintiff in error that this provision is valid; that it does not violate any principle of the common law; that it is not in conflict with any statute of the state of Wisconsin or of the state of Nebraska; that the object and effect of the contract . . . is not to exempt the company from responsibility for negligence, . . . but to offer ⁴²⁰ to the public a reasonable and practicable method of preventing errors and their injurious consequences, to secure a due proportion between charges and risk, and to protect the company against claims which, at the time of entering into the contract, cannot be known or foreseen, and for which, therefore, the company receives no compensation. . . . It may be fully admitted at the outset that this company cannot avail itself of any stipulation the design of which is to exempt it from the consequences of its own negligence, or that of its servants. The question is not whether the company can stipulate for exemption from liability for the negligence of itself or of its employes. Nor is the question whether it can so stipulate when the negligence is only ordinary as distinguished from gross. The proposition is, that the contract does not provide for exemption at all, but provides the means of avoiding errors and due compensation to the company for the service rendered and the risk assumed. If the contract be rightly interpreted, negligence does not enter into the consideration of its validity at all."

As we understand this argument, it is that the contract

printed on the telegraphic blank exempting the company from liability for a mistake in transmitting an unrepeatd message beyond the amount paid for transmitting the same does not conflict with the statute quoted. We think it does. The contract on the blank provides: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeatd message." The statute provides that the telegraph company "is hereby declared to be liable for the nondelivery of dispatches intrusted to its care and for all mistakes in transmitting messages made by any person in its employ; . . . and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed 421 blanks." Our conclusion is, that by the contract printed on its blanks the telegraph company seeks to exempt itself from liability for damages for mistake or neglect in transmitting or delivering an unrepeatd message and that the statute declares all such contracts unenforceable. The statute of Wisconsin—the state in which the contract for the transmission of the message in controversy was made—provides: "Any person, association, or corporation, operating or owning any telegraph lines doing business in this state, shall be liable for all damages occasioned by failure or negligence of their operators, servants, or employes, in receiving, keeping, transmitting, or delivering dispatches or messages." This statute is not materially different from our own. The Wisconsin statute was construed by the supreme court of that state in *Cutts v. Western Union Tel. Co.*, 71 Wis. 46. In that case, Lyon, J., speaking for the court, said: "It is claimed by counsel for the plaintiff that the above law renders each telegraph company doing business in this state liable for any and all damages sustained through its negligence in respect to the transmission of messages delivered to it for that purpose and flowing directly and approximately therefrom, even though the import of the telegram is wholly unknown to the company's agents, as in the case of cipher dispatches not translated to the agent. We shall not attempt an interpretation of this statute any further than to hold that it does render telegraph companies liable for the damages resulting directly from their negligence in the matter of transmitting messages; especially where, as in this case, the agent of the telegraph company is acquainted with the contents and significance of the message." It will thus be seen that both by the law of Wis-

consin, where the telegraphic contract in controversy was made, and the law of Nebraska, where the message was delivered, a contract entered into between a telegraph company and its patrons the effect of which is to exempt the company from liability for damages sustained ⁴²² by its patrons by reason of the mistake or neglect of the telegraph company to correctly transmit and deliver an unrepeatd message is illegal and unenforceable.

A second argument is that Altschuler's negligence contributed to the injury sued for. As already stated Altschuler interpreted the message received by him "one hundred and ninety dollars," and caused an attachment to be issued in favor of his client for that sum. But the message as delivered to Altschuler was not unintelligible. It was not couched in extraordinary or unusual language. Altschuler would certainly have been guilty of negligence had he interpreted the message received by him to read seven hundred ninety dollars. The expression "even hundred ninety dollars" was not different in meaning from what it would have been had it read "one hundred and ninety dollars even," and the interpretation placed on the message by Altschuler was a reasonable one. We do not think that the language of the message was of such a character as to give Altschuler reasonable cause for suspecting that a mistake had been made in its transmission. The foregoing are the only contentions which we deem it necessary to notice. There is no error in the record and the judgment of the district court is affirmed.

TELEGRAPH COMPANIES—LIABILITY FOR ERROR IN TRANSMITTING MESSAGE.—A telegraph company is liable to the sender of a message for the damages sustained by him by reason of its failure to transmit the message correctly. And a statute which makes a telegraph company liable "for all mistakes in transmitting messages, made by any person in its employ," and declares that it "shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," is reasonable in its requirements, and binding upon all telegraph companies in the state: *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363. Public policy forbids that a telegraph company should, by any contract, exempt itself from damages resulting from its negligence in transmitting cipher or obscure messages: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, and note.

TELEGRAPH COMPANIES CANNOT BY CONTRACT EXEMPT THEMSELVES from liability for their negligence, either ordinary or gross, or that of their servants, in the transmission of messages: *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609.

POSKA v. STEARNS.

[56 NEBRASKA, 541.]

SALES — COMMERCIAL AGENCIES — FALSE STATEMENT.—If a proposed buyer of goods, upon the request of a commercial agency, makes a statement of his financial condition which is reported by such agency, together with its own conclusions, to the proposed seller, a sale made on the faith of such report as a whole, and not particularly on the faith of the statement made by the proposed buyer, cannot be rescinded on the mere ground that such statement is false.

Sawyer, Snell & Frost, for the appellants.

G. E. Hibner, and Davis, Hibner & Whitmore, for the appellee.

542 RYAN, C. In this case, the certified transcript of the record shows that there was filed originally a petition in which the plaintiff was described as "Edgar G. Stearns, doing business under name and style of E. G. Stearns & Co.," and the affidavit and bond in replevin described the plaintiff in the same way; hence we cannot assume, as we are asked to do because of recitations in the bill of exceptions of amendments permitted to be made during the trial, that the original plaintiff was other than as above described. As the clerk of the district court has solemnly attested with his seal of office the condition of the petition when filed, we must accept that condition as established beyond question.

It is urged that there was error in refusing to sustain objections orally made to certain depositions when the same were about to be read to the jury. The ground of these objections was that in taking them postponements from day to day had occurred, and that there was no justification shown for these delays. It is possible, as suggested, that the officer who takes depositions in a foreign state may unreasonably keep in attendance a party or his attorney desiring to cross-examine a witness, but the remedy for this, if any there is, is not upon objections to the deposition when about to be read to the jury. It is provided by section 390 of the Code of Civil Procedure: "No exception other than for incompetency or irrelevancy shall be regarded unless made and filed before the commencement of the trial." The objections as made were properly overruled.

This action was one of replevin in the district court of Lancaster county and was for the recovery of goods sold by plaintiff, a merchant doing business in Chicago, Illinois, **543** to L. Berk-

son, a retail merchant doing business in Lincoln, Nebraska. The defendants other than L. Berkson were made such because of their claims of liens upon the goods under L. Berkson. The goods had been delivered to L. Berkson at Lincoln when this action was begun, and the recovery of the right of possession of them was predicated upon the claim that the sale had been induced by certain false and fraudulent representations of L. Berkson relied upon by plaintiff. These representations were communicated to plaintiff by the R. G. Dun & Co. mercantile agency in this language:

"L. Berkson, D. G. & Notions.

"Lincoln, Neb., July 8, 1893.

"Think his stock would invoice fully twelve thousand dollars; insured for ten thousand dollars and says twelve hundred dollars would pay his entire indebtedness. Is doing a fair business which is managed economically and with some profit. Has been here a good many years and no complaints are heard of him in any way. His stock is largely of cheaper variety and would suffer heavy shrinkage on forced sale. Is generally conceded a net worth of four to five thousand dollars, this estimate allowing liberally for shrinkage in stock. Prospects thought fair."

The R. G. Dun & Co. mercantile agency, at the date of above memorandum, was represented at Lincoln by Frank Blish. When the order was sent into Chicago for the goods wished by L. Berkson, plaintiff applied to R. G. Dun & Co. for a special report upon the financial standing of said Berkson, and Blish was requested to make it to said agency. He went to Berkson and, as he himself admitted, obtained from Berkson only a part of the data upon which his report was founded. An examination of the report itself discloses that there was no pretense therein that Berkson had made the statements therein embodied, except that he estimated that twelve hundred dollars would pay his entire indebtedness. Even this was contradicted in Berkson's testimony and by that of his nephew. For the purposes of this case, however, it may ⁵⁴⁴ be conceded that Blish was correct in his version of what Berkson said to him. When this written statement above copied was offered in evidence objections were interposed and overruled, to which ruling the defendants excepted. In the further progress of the trial there was evidence that Berkson, at the time of said statement, was owing more than five times the amount stated as his entire indebted-

ness. Russel M. Foltz, who described himself in his deposition as the credit-man and office manager of E. G. Stearns & Co., testified that E. G. Stearns & Co., in extending credit to L. Berkson, relied solely on the report of R. G. Dun & Co.; that he looked over that report, and from that decided that L. Berkson was entitled to have the merchandise he had ordered shipped to him. This reliance was, therefore, upon all the statements of the report and not specially upon that portion containing what purported to be the statement of Mr. Berkson himself. In the admission of this statement in evidence we think there was error, for, according to the testimony adduced by plaintiff, he might have been entirely influenced by that portion of the report which contained the views of Mr. Blish, for which there is no pretense that Mr. Berkson was responsible.

A case much resembling that at bar in its facts was reported in *Wachsmuth v. Martini*, 154 Ill. 515, and sustains the view we take of the law as applied to this case: See, also, *Runge v. Brown*, 23 Neb. 817; *Upton v. Levy*, 39 Neb. 331; *Kilpatrick Koch Dry Goods Co. v. McPheely*, 37 Neb. 800; *Lorenzen v. Kansas City Investment Co.*, 44 Neb. 99. The instructions of the court given, and the rulings on those of defendants requested, were in harmony with the theory upon which the report of R. G. Dun & Co. was admitted in evidence. For the error indicated, the judgment of the district court is reversed and the cause is remanded for further proceedings not inconsistent with the views above expressed.

SALES—FALSE STATEMENTS—COMMERCIAL AGENCIES.—The doctrine is firmly established in England and America that a vendor, induced by misrepresentation or fraudulent concealment to sell goods to a purchaser who is insolvent and has no intention to pay for them, may disaffirm the sale, and reclaim the goods as against the fraudulent vendee, or any person claiming under him with notice. The same rule prevails where the false information is furnished through a mercantile agency: Extended note to *Reid v. Cowduroy*, 18 Am. St. Rep. 362. The vendor must rely on these representations of the vendee, and not upon other knowledge or information: Extended note to *Thurston v. Blanchard*, 33 Am. Dec. 710. The same rule holds true as to the right of a purchaser to avoid a sale for false statements made by the vendor, such purchaser being bound by his purchase where the false statements were made by third parties: *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830.

CARSON v. BROADY.

[56 NEBRASKA, 648.]

LANDLORD AND TENANT—DENIAL OF TITLE BY TENANT.—A tenant cannot, while in possession of the premises, deny his landlord's title, even before the lease is made, and this rule is applicable in every case in which such possession has been obtained by permission of the owner and in recognition of his title.

LANDLORD AND TENANT—ADVERSE POSSESSION.—A tenant who remains in possession after the expiration of his term, without any express repudiation of the relation created by the lease, does not hold adversely to the landlord, no matter what his secret intention may be.

PARTITION—CONFLICTING TITLES—ESTOPPEL.—If, in an action for the partition of land, the issue arising upon the conflicting legal titles is tried without objection, and the title is conclusively established in favor of one of the parties, the adversary party cannot be heard to question the correctness and binding effect of such judgment.

COTENANCY—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.—The purchase by a cotenant of an outstanding title to or encumbrance on the joint estate inures to the common benefit and entitles the purchaser to contribution.

COTENANCY—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.—The purchase of an outstanding title or encumbrance to property by a party before he becomes a cotenant therein does not entitle him to contribution, when the purchase is not made actually or constructively for the benefit of any future cotenant.

TAXATION—TAX LIENS—LIMITATION OF ACTIONS.—An action for the enforcement of a tax lien is barred at the expiration of five years from the time that the cause of action accrued.

TAXATION—VOID TAX DEED—LIMITATION OF ACTIONS.—The statute of limitations begins to run against a void tax deed at the time when it is issued, and not at the time that such deed is judicially determined to be void.

TAXATION—TAX LIENS—LIMITATION OF ACTIONS.—When the cause of action on a tax lien becomes barred by limitation, the lien itself is extinguished and ceases to be a charge upon the land.

COTENANCY — IMPROVEMENTS — PARTITION.—If one tenant in common has had exclusive possession of the common property, and has made valuable improvements thereon without the consent of his cotenant, there should, in partition, be set apart to him that portion on which the improvements are made, if this can be done without prejudice to the cotenant, but if the property is not susceptible to physical division it should be sold and the proceeds divided equally among the cotenants, after deducting therefrom, for the benefit of the tenant in possession, such sum as the salable value has been enhanced by such improvements.

COTENANCY—LEASE—PRESUMPTION.—If a cotenant leases the whole property, and remains in possession after the termination of his term, discharging the obligations imposed upon him by the lease, he is presumed to hold under the lease, or an implied renewal thereof, and subject to its provisions.

J. H. Broady, for the appellants.

Reavis & Reavis, for the appellee.

⁶⁴⁹ SULLIVAN, J. This action for the partition of one hundred and sixty acres of land lying in Richardson county was commenced by Marion A. Carson, Edith Carson, William Carson, and L. Ward Carson against Jefferson H. Broady and John Tighe. The ⁶⁵⁰ defendants answered, denying plaintiffs' title, alleging title in themselves by adverse possession, and setting up a claim for moneys expended by them in purchasing outstanding tax titles, paying taxes, and improving the premises. From a decree confirming the shares of the parties, directing partition, and adjusting incidental equities the defendants have appealed.

The facts out of which the litigation has arisen, and which are essential to an understanding of the questions here presented for decision, may be summarized as follows: The real estate in controversy was originally owned by David E. Carson, who died intestate in the year 1862. His heirs were his six brothers and sisters. In October, 1877, William Carson, one of these brothers, also died intestate leaving surviving him his widow, Louise W. Carson, and four minor children. These children are the plaintiffs in this action. In 1875, a tax deed for the entire tract, based on a sale for the delinquent taxes of 1872, was issued by the treasurer of Richardson county to Edwin S. Towle. In 1877, Elizabeth Shrauger purchased Towle's interest in the premises and proceeded at once to occupy and improve the same. In June, 1880, Shrauger sold and delivered possession of the west eighty to Henry Nedrow. In 1877, a treasurer's deed, based on a sale of the land for the delinquent taxes of 1874, was issued to Charles Brunn, who, in June 1881, sold and transferred his interest to the defendants. In September of the last-named year the defendants obtained from the surviving brothers and sisters of William Carson a deed for their undivided interest in the land; and, desiring to secure the one-sixth interest of the plaintiffs, who were then minors, proceedings were instituted at the instance of defendants to bring about for their benefit, a guardian's sale of the land. These proceedings were afterward abandoned, but while they were pending the defendants, in order to obtain a title on which they could maintain ejectment against Shrauger and Nedrow, secured from the plaintiffs, on October 14, 1881, a lease for their one-sixth ⁶⁵¹ interest. This lease was immediately recorded and action for pos-

session commenced. A compromise of these cases was afterward effected, whereby the possession of Shrauger and Nedrow was surrendered, and their interests conveyed, to Broady and Tighe, who have ever since occupied the premises.

These appellants now insist that they were in the exclusive, adverse occupancy of the land for more than ten years before the action for partition was commenced, and that the right of the plaintiffs to assert their title is barred by the statute of limitations. This contention cannot be sustained. The defendants recognized the validity of plaintiffs' title, and, by relying on it and claiming under it, they effected a compromise of the ejectment suits and were thus let into possession of the land. It is an ancient and well-settled rule of law that a tenant cannot, while occupying the premises, deny his landlord's title. This is so even where he was in possession before the lease was made: *Richardson v. Harvey*, 37 Ga. 224; *Thayer v. Society of United Brethren*, 20 Pa. St. 60; *Lucas v. Brooks*, 18 Wall. 436; *Sage v. Halversen*, 72 Minn. 294. And the principle is applicable to every case in which the possession of land has been obtained by the permission of the owner and in recognition of his title: *Dubois v. Marshall*, 3 Dana, 336; *Downer v. Ford*, 16 Cal. 345; *Love v. Edmondston*, 1 Ired. 152. The relation of landlord and tenant was created by the lease. The defendants, until the answer was filed in this case, did not repudiate that relation or indicate by any clear and unequivocal act their intention to hold adversely. Under these circumstances, their holding was not adverse, in contemplation of law, whatever may have been their secret purpose. Besides at the time they obtained possession, they were, with the plaintiffs, tenants in common of the land. They were negotiating for the purchase of the plaintiffs' title; they recognized its validity then, and even as late as 1889 made application to buy it. They did no act at any time evincing an ⁶⁵² intention, on their part, to oust their cotenants; and they could not, by a mere silent peaceable possession, however long continued, extinguish the plaintiffs' title: *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Purcell v. Wilson*, 4 Gratt. 16; *Day v. Davis*, 64 Miss. 253; *Peeler v. Guilkey*, 27 Tex. 355; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350.

In the brief filed for the appellants it is argued that, the title of the plaintiffs being denied, the court was without authority to determine the questions in issue in an action to partition the land. Upon this point it is sufficient to say that the issues were tried without objection, and the averments of the petition

established by undisputed proof. The defendants submitted their cause to the court without protest. They would have willingly accepted the decision had it been favorable to them, and they cannot be heard to complain on this ground because it is against them.

We proceed now to consider the equities of the parties incident to a partition of the land. The defendants ask to be reimbursed for moneys expended in purchasing outstanding tax titles and in improving the property. In the case of *Brown v. Homan*, 1 Neb. 448, it was held that the purchase by a tenant in common of an outstanding title to, or encumbrance on, the joint estate would inure to the common benefit and entitle the purchaser to contribution. And this is believed to be the universal rule: See collection of cases in 7 Am. & Eng. Ency. of Law, 2d ed., 354. By compromising the actions against Shrauger and Nedrow, and obtaining their interests under the tax deed issued to Towle, the defendants secured for themselves and for the plaintiffs, as their lessors and cotenants, the immediate, peaceable possession of the land, and thus extinguished a valid lien and an adverse occupancy. Having shared in the benefits of the purchase, and claiming now the fruits of the lease, which became at once effective by the settlement of the litigation, the plaintiffs are bound to contribute their just proportion of the amount paid by the defendants in effecting the compromise: 653 *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Lee v. Fox*, 6 Dana, 172; *Oliver v. Montgomery*, 42 Iowa, 36; *Moon v. Jennings*, 119 Ind. 130, 12 Am. St. Rep. 383; *Watson's Appeal*, 90 Pa. St. 426; *Packard v. King*, 3 Colo. 214; *Calkins v. Steinbach*, 66 Cal. 117. But the claim of the defendants for money expended in purchasing the interest of Charles Brunn is on an entirely different footing. It cannot be allowed. At the time Brunn's rights were acquired the defendants had no title to the land. They were not the plaintiffs' cotenants, and did not actually, or by implication of law, purchase for the benefit of the plaintiffs, as well as for their own advantage. By the Brunn deed they secured for their own exclusive benefit a lien for the amount of the taxes paid by Brunn. This lien they might have enforced by an appropriate action seasonably brought. They were entitled to have one-sixth of the amount paid by them charged as a specific lien against plaintiff's interest in the land, and to obtain satisfaction by a sale of such interest. They, however, failed to move in the matter within the time limited by the statute for that purpose, and, under the decisions of this

court, their lien is now extinguished. An action for the enforcement of a tax lien is barred at the expiration of five years from the time the cause of action accrued: *Helphrey v. Redick*, 21 Neb. 80; *Warren v. Demary*, 33 Neb. 327; *Black v. Leonard*, 33 Neb. 745. It is also settled by *Alexander v. Thacker*, 43 Neb. 494, that the statute in such cases begins to run when a void tax deed is issued, and not at the time such deed is judicially determined to be null. The vital infirmity of the treasurer's deed to Brunn was congenital, and, therefore, the execution of that instrument, and the failure of the title which it assumed to convey, were concurrent events. And, according to the rule established by *Alexander v. Shaffer*, 38 Neb. 812, and *Foree v. Stubbs*, 41 Neb. 271, when the cause of action became barred, the lien itself was extinguished and ceased to be a charge upon the land.

Since the defendants have been in possession of the ⁶⁵⁴ land they have made lasting and valuable improvements thereon. These improvements were made without the privity or consent of the plaintiffs, but not in ignorance of the fact that they were co-owners. Under these circumstances, if the property can be divided without prejudice to the rights of the parties, there should be set apart to the defendants the portion on which the improvements are situated, and, if it cannot be divided, but must be sold, there should be deducted from the gross proceeds of the sale such sum as, in the opinion of the court, the salable value has been enhanced by such improvements, and the balance should be divided between the litigants according to their respective interests. This is the general rule, and is sustained by the great weight of the authorities, but exceptional cases may arise in which it would be inequitable to permit it to govern: *Sarbach v. Newell*, 30 Kan. 102; *Dean v. O'Meara*, 47 Ill. 120; *Moore v. Thorp*, 16 R. I. 655; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Johnson v. Pelot*, 24 S. C. 255, 58 Am. Rep. 253; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911. There is, however, no difficulty in applying it in this case, for plaintiffs in their brief say: "We have no purpose, nor are we instructed, to insist upon anything that is not plainly justifiable upon the broadest principles of equity and exact justice. Our first and only purpose was to procure a division of this land according to the rights of the parties. When we take twenty-six acres and a fraction from one side of the quarter section in question, we do not expect the court to advise the referees to give us the part upon which the most valuable improvements are

located. We do not ask that. We only want the land, and if in the division of the land some of the hedge fence shall be given to us, we are willing to pay for that, if our friends on the other side will pay us for the use of the land while they have had it, and we are willing that a balance shall be struck on the basis of our share of the Shrauger claim, coupled with the improvements on the part that shall be awarded to us, provided, as against that, the appellants be required to account for the use of ⁶⁵⁵ the land for the last twelve years." In view of the conclusions reached on the several questions discussed by counsel, we find no difficulty in adjusting the rights of the parties in accordance with the foregoing offer and request. It now remains to dispose of the claim of the plaintiffs for use and occupation. The lease executed to the defendants was for a term of three years, and imposed on the lessees the duty of paying taxes and making repairs. Neither at the expiration of the term fixed, nor afterward, was there any communication between the parties indicating a surrender of the demised interest or a termination of the tenancy by mutual consent. The defendants, however, paid the taxes and made necessary repairs up to the time this action was commenced, without demanding contribution. From these facts we infer that they continued to hold under the lease and subject to its provisions. Indeed, there is excellent authority for presuming, from the mere retention of possession, that the relation of landlord and tenant continued, as in other cases, under an implied renewal of the contract: *Chapin v. Foss*, 75 Ill. 280; *Harry v. Harry*, 127 Ind. 91; *O'Connor v. Delaney*, 53 Minn. 247, 39 Am. St. Rep. 601. The holding, then, being under the lease, the provisions of that instrument fix the mutual rights and obligations of the parties with reference to taxes and rent during the entire period that the defendants have been in possession of the property.

The judgment, to the extent that it confirms the shares of the parties and directs partition to be made, is affirmed. In all other respects it is reversed. The cause is remanded to the district court with direction to allot to the defendants the portion of the land upon which are situated the most valuable improvements, and to charge upon the share assigned to the plaintiffs a lien in favor of the defendants: 1. For the value of any improvements placed by them on that part of the land; 2. One-sixth of the amount paid for the conveyances obtained from Shrauger and Nedrow; and 3. Interest on the latter sum ⁶⁵⁶ at the rate of seven per cent from the time the money was ex-

pended. If the land shall be sold, in consequence of being incapable of physical division without prejudice to the owners, the court will ascertain what sum has been added to its sale value by the improvements in question. Such sum shall be awarded to the defendants, and the balance only shall be subject to distribution.

Judgment accordingly.

Irvine, C., not sitting

LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE.—Tenancy is the result of a contract between the landlord and the tenant by which the latter admits the lessor's title, and he and his privies are estopped, while continuing in possession, to dispute such title. *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678.

LANDLORD AND TENANT—ADVERSE POSSESSION.—The possession of a tenant is not adverse: *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, and note.

PARTITION—CONFLICT OF TITLES—JUDGMENT.—The rule that a judgment is conclusive on all the issues determined by it applies as well to judgments in partition as to judgments in any other form or kind of actions. Hence, whenever the title is in issue, it is bound by the judgment: Extended note to *Nicely v. Boyles*, 40 Am. Dec. 640; *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95; *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. Rep. 292.

COTENANCY—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.—A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the benefit of his cotenant: *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 241. Such purchaser is entitled to contribution from his fellow tenants: *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, and note; *Haverford Loan etc. Assn. v. Fire Assn.*, 180 Pa. St. 522, 57 Am. St. Rep. 657.

TAX DEEDS—LIMITATION OF ACTIONS.—A statute providing that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor, is constitutional, and prevents the recovery of lands held by the defendant under a tax deed, on the ground that there was no notice of sale, and that the lands were improperly sold *en masse*: *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224. See the note to *Wain v. Shearman*, 11 Am. Dec. 627.

COTENANCY — PARTITION — IMPROVEMENTS. — Where property cannot be divided, but must be partitioned by sale, and improvements made by one cotenant have enhanced its value, he cannot be awarded the costs thereof, but should be given the actual enhancement of value therefrom existing at the time of the sale, though the improvements were not made at the request of the cotenants: *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, and extended note; *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733.

SHULL v. BARTON.

[56 NEBRASKA, 716.]

BONDS IN REPLEVIN—APPROVAL—LIABILITY OF OFFICER.—Under a statute providing that a sheriff or other officer shall be responsible for the sufficiency of the sureties in a replevin bond taken by him, if such sureties are excepted to, until they justify, an officer approves a replevin bond at his peril, after exception to, and before justification of the sureties therein.

BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.—The fact that an officer acts in good faith in approving a replevin bond does not of itself protect him from liability for negligence in respect thereto.

BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.—If the surety on a replevin bond is good, solvent, and sufficient when it is approved by the officer, the subsequent insolvency of the surety does not render the officer liable.

BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.—To escape liability for an insufficient surety on a replevin bond after it has been excepted to, and the officer has notice thereof, he must not be guilty of negligence, and, if he negligently approves such bond signed by insolvent or insufficient sureties, he is answerable for consequences.

BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.—The mere taking by an officer of the affidavit of a surety on a replevin bond that he is the owner of real estate in the county wherein the replevin action is pending, not exempt from execution, of twice the value of the replevied property, is of itself not enough to justify the officer in approving the replevin bond, and such affidavit does not of itself protect the officer from liability for an insufficient bond.

BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.—An officer, before approving a replevin bond, should make such investigation and inquiry concerning the financial standing and solvency of the surety as a reasonably prudent man would make before extending credit to the surety to the amount of the bond.

BONDS IN REPLEVIN—LIABILITY OF OFFICER.—If a creditor attaches property as that of his debtor, and it is taken in replevin from the attaching officer and delivered to the claimant under a replevin bond, and the creditor, pending the replevin suit, takes the property on execution for the same debt for which he attached it, such seizure under execution is a defense for the officer in a suit against him by the creditor for negligently approving an insufficient replevin bond, and the creditor cannot set up the invalidity of the seizure under execution as a defense.

ATTACHMENT OF REPLEVIED PROPERTY.—If property has been attached and then replevied, and replevin bond given, the plaintiff in the attachment, while the replevin bond is pending, cannot levy an attachment or execution thereon.

ATTACHMENT—REPLEVIN—EXECUTION.—A party who has attached property, if it is replevied from him or from the attaching officer, must follow the replevin action to final judgment, and, if successful, satisfy his claim by an execution upon the judgment, and, failing in that, look to the replevin bond, and, failing in

this, look to the negligence or bad faith of the officer in taking an insufficient replevin bond, if such were the facts.

BONDS IN REPLEVIN—ACTION AGAINST OFFICER—PARTIES.—A sheriff, from whom attached property has been replevied, cannot, on the termination of the replevin suit in his favor, and the return unsatisfied of an execution on the judgment, maintain an action against an officer personally who took the property in replevin, for negligently approving an insufficient replevin bond. In such case, the creditor, and not the sheriff, is the real party in interest, although the sheriff may maintain an action on the replevin bond as the obligee named therein and trustee for the attaching creditor.

BONDS IN REPLEVIN—ACTION AGAINST OFFICER.—Several creditors, who have lost their claims against a debtor, and their attachment liens against his property, through a negligently approved and insufficient bond in replevin, cannot join as plaintiffs in a suit against the officer serving the writ of replevin for damages for negligently approving the replevin bond.

W. H. Morris, for the appellants.

Hastings & Sands, for the appellees.

720 RAGAN, C. Henry B. Shull and others have filed a petition in error **721** here to review a judgment of the district court of Saline county recovered against them by John Barton and others. To a proper understanding of the points decided here it is necessary to make a statement of some of the undisputed facts disclosed by the record. The plaintiff in error, Shull, is the coroner of Saline county. The other plaintiffs in error are the sureties on his official bond. In July, 1891, a copartnership under the name of Foster & Ayres was conducting a mercantile or drug business in De Witt, in said county. On that date Coe & Co., Brittain-Smith & Co., Midland Coffee and Spice Company, Funke & Ogden, Raymond Brothers, the American Hand-Sewed Shoe Company, and one Warren E. Ayres, all of which parties will hereinafter be denominated the seven creditors, each brought a suit against Foster & Ayres in the county court of said county, and each caused a writ of attachment to be issued and placed in the hands of the sheriff of said county. The sheriff, by virtue of these several writs of attachment, seized the mercantile stock of Foster & Ayres. Thereupon Lafayette M. Foster and Jennie A. Foster, his wife, doing business as Foster & Co., brought a replevin action against the sheriff for the goods which he held under the attachment writs, and by the process issued in that action all the goods held by the sheriff were taken and delivered to Foster & Co. The coroner, plaintiff in error here, executed the replevin writ. The sheriff, who was made sole defendant in the replevin suit, gave

notice to the coroner of exceptions to the sufficiency of the sureties who had signed the replevin bond of Foster & Co.; and thereupon the surety who had signed the replevin bond made affidavit that she was a resident of Saline county; that she owned real estate therein not exempt from execution of the value of two thousand five hundred dollars. This affidavit the surety delivered to the coroner. Indeed, it was sworn to before him, and he at once approved the bond or undertaking in replevin. About August 1st, of said year, the seven creditors obtained judgments in the county court on their claims against Foster ⁷²² & Ayres. The county judge issued executions upon these judgments, or some of them, and they came into the hands of the sheriff, and he at once levied them upon the same property which he had attached, and which had been replevied, and delivered to Foster & Co.; and, by virtue of said executions, he again took into his possession said mercantile stock. The goods were again, by an action of replevin, taken from the possession of the sheriff. When the sheriff levied the execution upon the mercantile stock, the replevin action brought by Foster & Co. was pending and undecided. This replevin action proceeded to trial, and the sheriff had judgment for a return of the replevied property or its value in money. The replevied property was not returned. The sheriff caused an execution to be issued upon his judgment, and this was returned wholly unsatisfied. The sheriff and the seven creditors then brought this action in the district court of Saline county against the coroner and the sureties on his official bond. For cause of action they set out the claims of the seven creditors against Foster & Ayres; the seizing of the latter's property by writs of attachment; its having been taken from the sheriff on the writ of replevin in favor of Foster & Co.; the approval of the undertaking in replevin by the coroner; the reduction of the claims of the seven creditors against Foster & Ayres to judgment; that the judgments were wholly unpaid; the prosecution of the replevin action to judgment in favor of the sheriff; the return of an execution issued on such judgment unsatisfied; the insolvency of Foster & Co., and the surety on their replevin bond as a reason why they had not brought suit on said bond, and averred that at the time the coroner approved of the replevin bond the surety thereon was then and there insolvent; and that the coroner negligently approved said bond, by reason whereof the said seven creditors had lost their liens upon the attached property, and lost the full amount of their claims against Foster & Ayres. On the trial in the district

court, the coroner and his sureties demurred ⁷²³ to the petition of the sheriff and the seven creditors on the ground that there was a defect of parties plaintiff, and that several causes of action were improperly joined in the petition. This demurrer was overruled, and the coroner and his sureties then filed an answer to the petition, in which, among other things, they averred that there were several causes of action improperly joined in the petition and that there was a misjoinder of parties plaintiff. On the trial, the coroner and the sureties offered in evidence the executions already alluded to, which had been issued by the county court in favor of the seven creditors against Foster & Ayres, and offered to show that the sheriff had, by virtue of these executions, seized the same property which the seven creditors had formerly attached as the property of Foster & Ayres, and which had been taken from the possession of the sheriff in the replevin action. The record presents but three questions which we deem it absolutely necessary to notice.

1. It is contended first in behalf of the coroner that the uncontradicted evidence shows that he acted in good faith in approving the replevin bond, and that he is not liable simply for negligence. The evidence is undisputed that the sheriff duly notified the coroner that he objected to the sufficiency of the surety on the undertaking in replevin; that the only inquiry or effort which the coroner made to ascertain if that surety was sufficient was that he took and relied upon the surety's affidavit, filed with him, in which the surety stated that he was the owner of real estate in the county not exempt from execution of the value of two thousand five hundred dollars; that the averments of this affidavit were absolutely and unqualifiedly false; but the evidence does not show that the coroner acted in bad faith in approving this undertaking. It does show, beyond peradventure, that he was guilty of negligence in the premises. Section 189 of the Code of Civil Procedure provides that when an officer is notified by a defendant in replevin that he excepts to the sufficiency of the sureties ⁷²⁴ on a replevin bond, then the surety must justify in the same manner as "bail on arrest." At the time this provision of the code was adopted there was in force in this state a statute which permitted the arrest of a defendant in a civil action for debt; that the defendant so arrested might, at any time, before judgment, be released by causing one or more sufficient bail to execute an undertaking to the plaintiff to the effect that if the judgment should be rendered in the action against the defendant he would render himself amenable

to the process of the court. The statute further provided that the plaintiff might object to the sufficiency of the bail given, and that, if he did so, the sheriff should require the bail to justify. The statute further provided that the bail should justify by appearing before a proper officer at a time and place mentioned for examination by him under oath, touching his sufficiency as bail, in such manner as such officer might think proper. It seems to have been the purpose and intention of this statute that the sheriff should not be liable for having taken an insufficient bail, provided it justified as required by the statute. In other words, if the officer before whom the bail appeared for justification approved it, this was a protection to the officer: See Gen. Stats. 1873, p. 547. But this statute was repealed by the legislature of 1887: See Sess. Laws 1887, p. 654. Since no statute exists in this state authorizing the arrest of a defendant in a civil action for debt, the provision of section 189 of the code which provides that the surety in a replevin bond must justify in the same manner as bail on arrest, is meaningless. Neither the common law nor the old English statutes permitted a sheriff to admit to bail one arrested in a civil action for debt, and exonerate himself from liability to the plaintiff for the escape of the defendant by having the bail for the defendant justify. But the rule at common law was, that if the defendant, after being arrested, was admitted to bail by the sheriff, and then failed to appear, the sheriff and the sureties on his official bond ⁷²⁵ were liable to the plaintiff for his debt: 3 Blackstone's Commentaries, Chitty's ed., 290. We conclude, therefore, that, where exceptions are taken to the sureties on a replevin bond, the officer is not obliged to cause the sureties to justify in the manner which the old statute required bail on arrest to justify; and the officer's failure to cause the sureties to so justify does not necessarily and of itself render him liable to the defendant in the replevin action. Nor do we think that if the officer should require the sureties on the replevin bond to justify in the same manner as the old law required "bail on arrest" to justify, he would thereby unconditionally release himself from liability by reason of the insufficient surety on the replevin bond. Section 189 of the Code of Civil Procedure provides that the sheriff or other officer shall be responsible for the sufficiency of the sureties, if excepted to, until they justify; and, since no statute exists which prescribes before whom the surety shall justify, nor what facts shall be made to appear to protect the officer, it follows that when the

sureties on the replevin bond are excepted to the officer approves the replevin bond at his peril. He must, of course, always and at all times act in good faith. But good faith alone will not protect him: *People v. Core*, 85 Ill. 248. If the surety on the replevin bond, when approved, is then good, solvent, and sufficient, subsequent insolvency of the surety would not render the officer liable. But to escape liability for an insufficient surety on a replevin bond after it has been excepted to, and the officer had notice thereof, he must not be guilty of negligence; and if he negligently approve a replevin bond which is signed by insolvent or insufficient sureties he is answerable for the consequences: *People v. Core*, 85 Ill. 248; *Sparhawk v. Bartlet*, 2 Mass. 188; *Young v. Hosmer*, 11 Mass. 88; *Rayner v. Bell*, 15 Mass. 377. The mere taking by the officer of the affidavit of the surety that he, the surety, is the owner of real estate situate in the county where the replevin action is pending, not exempt from execution, of twice the ⁷²⁶ value of the replevied property, is of itself not enough to justify the officer in approving the replevin bond, and such affidavit will not of itself protect the officer from liability for an insufficient bond. In such a case, it would seem that the officer should make inquiries of persons likely to know as to the financial standing, solvency, and property of the surety. He might require the surety to schedule his assets and liabilities, and with this in hand he should make such examination of public records and investigations and inquiries as a reasonably prudent man would make before extending credit to the surety to the amount of the bond. In the case at bar, the coroner did nothing—made no inquiries, instituted no search—to ascertain the financial standing and worth of the surety on the replevin bond. He did not require the surety to furnish him a schedule of his assets and liabilities. He simply rested satisfied with the voluntary affidavit of the surety as to the worth of the property which he owned. This was not enough to protect the coroner from liability. He was guilty of negligence.

2. But we think the district court erred in refusing to permit the coroner to introduce in evidence the executions issued by the county court based on the judgments rendered in favor of the seven creditors against *Foster & Ayres*. These executions and the return of the officer thereon tended to show that the seven creditors, or some of them, had, by virtue thereof, seized the identical property which they had previously attached. If the seven creditors who brought this action, by

virtue of the executions from the county court, took the identical and all the property which they had previously attached, then they have no cause of action against the coroner for approving an insufficient bond. How can it be said that they have lost the property which they attached because of the coroner's approving an insufficient replevin bond therefor, when, by another legal process, namely, an execution, they subsequently became possessed of the same property for the satisfaction of the same debt for which ⁷²⁷ they had attached it? It is true that the levy of this execution by the sheriff and the seven creditors upon this property which had been attached and then replevied was void; that they, and each of them, were trespassers and, probably, in contempt of court because thereof. But they are in no position here to take advantage of their wrongful act. There is no conflict of authority upon the proposition that when property has been attached and then replevied, the plaintiff in the attachment, while the replevin suit is pending, cannot levy an execution or attachment thereon. Indeed, some authorities go so far as to say that property attached and then replevied is in custody of the law, and, while the replevin action is pending, cannot be seized on attachment or execution at the suit of any person: *Bates County Nat. Bank v. Owens*, 79 Mo. 429. But every court to which the question has been presented, we think, has denied the right of a plaintiff who has attached property after it had been replevied from him, and while the replevin action was pending, to levy another attachment or execution upon it. We cite a few of the cases: *Goodheart v. Bowen*, 2 Ill. App. 578; *Rhines v. Phelps*, 3 Gilm. 455; *Hagan v. Lucas*, 10 Pet. 399; *Pipher v. Fordyce*, 88 Ind. 436; *Acker v. White*, 25 Wend. 614; *Selleck v. Phelps*, 11 Wis. 398 [380]; *Metzner v. Graham*, 57 Mo. 405; *Bates County Nat. Bank v. Owen*, 79 Mo. 429. Under our statute, when attached property is replevied and delivered to the plaintiff in the replevin suit, and the replevin bond required by statute is given and approved, then that property, pending that replevin action, cannot be taken in attachment or execution at the suit of the plaintiff who has attached it. The reason is, that the statute makes the bond take the place of the property. Many courts give as a reason for this that the property is in custody of the law. We do not know whether this is the correct reason, but certainly, under our statute, the bond takes the place of the property. The conditions of the bond are that the plaintiff in the replevin suit will make ⁷²⁸ return of the property or pay its value in

money if the judgment go against him. The party then who has attached property, if it be replevied from him or from the officer who executed his writ of attachment, must follow the replevin action to final judgment, and, if successful, satisfy his claim by an execution upon the judgment, and, failing in that, look to the replevin bond, and, failing in this, to the negligence or bad faith of the officer in taking an insufficient replevin bond, if such were the facts.

3. As already stated, the plaintiffs below in this action were the sheriff of Saline county and the seven creditors who had attached the property of Foster & Ayres. The sheriff is not a proper party plaintiff in this action. He was the defendant in the replevin action, obtained a judgment in that action, and caused an execution to be issued thereon which was returned, "No property found." As the defendant in the replevin action he represented the seven creditors and was the proper defendant to that action. Doubtless, he might have maintained a suit on the replevin bond for the satisfaction of the judgment which he obtained against the plaintiff in replevin, as he was the obligee in that bond, but that he did not do, because, as stated in the record, that bond is worthless. The replevin bond being worthless, and the execution issued on the judgment rendered in the replevin action having been returned "No property found," the sheriff had no further connection with the controversy. He had discharged his duties, and all of his duties, in the premises. He cannot maintain an action against the coroner for damages for approving an insufficient replevin bond. He is not the real party in interest. The seven creditors have not a joint action against the coroner for approving an insufficient replevin bond, and they cannot unite as plaintiffs in such an action if the coroner approved an insufficient replevin bond, and any one of the seven creditors sustained damage thereby, then a cause of action arose in favor of such creditor against the coroner and the sureties on his official bond. But these creditors are ⁷²⁰ not agents, one for the other, so that one may bring an action for all; nor may all of them jointly bring such an action. The judgment of the district court is reversed and the cause remanded, with instructions to dismiss the action so far as the sheriff of Saline county is concerned, and with permission to each of the seven creditors to docket a separate action against the coroner and his sureties, and for such other proceedings as are according to law.

REPLEVIN — BONDS — REMEDIES — OFFICERS.—Where a sheriff levies execution upon sufficient property which is taken from his possession under replevin suit, in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in such replevin suit, and he is not entitled to indemnity from the plaintiff in the execution as a condition of his prosecuting the undertaking: *Swezey v. Lott*, 21 N. Y. 481, 78 Am. Dec. 160.

BONDS IN REPLEVIN—DAMAGES.—What damages may be recovered in an action upon a replevin bond: *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. Rep. 603.

ATTACHMENT OR EXECUTION—PROPERTY NOT SUBJECT TO.—**THE GIVING OF A DELIVERY BOND**, after the levy of a writ of attachment wherein the sureties undertake, in the event of the plaintiff's recovering judgment, to deliver the property to the officer who levied the writ, or, on failure to do so, to pay the value thereof, not exceeding the amount of the judgment, does not release the lien of the attachment, nor render the property subject to seizure under other writs while in the hands of the defendant in attachment: *Stevenson v. Palmer*, 14 Colo. 565, 20 Am. St. Rep. 295.

CASES
IN THE
SUPREME COURT
OF
OHIO.

ZUELLIG v. HEMERLIE.

[60 OHIO STATE, 27.]

SURETYSHIP—SUBROGATION OF SURETY TO SECURITY HELD BY PRINCIPAL.—If a surety on a note furnishes his principal with money to pay off the debt, and the latter applies the money to that purpose, he must be regarded as the mere agent of the surety and the latter is entitled in equity to be subrogated to whatever securities the creditor has or had for the payment of such debt.

SURETYSHIP—SUBROGATION OF SURETY—LIMITATION OF ACTION.—The right of a surety who has paid the debt of his principal to be subrogated to any securities held by the creditor as additional security for such debt, may become barred by lapse of time, and, under the Ohio statute, it is barred unless an action is brought within ten years from the time the cause of action accrued.

LIMITATION OF ACTIONS—DEMURRER.—The statute of limitations may be invoked by general demurrer when the lapse of time appears on the face of the petition.

SURETYSHIP—REMEDY OF SURETY.—A surety who has paid a note or other security for his principal cannot sue upon it directly in an action at law. His remedy is upon the implied contract of indemnity.

Dickey, Brewer & McGowan, for the plaintiff in error.

Solders, Hogsett & Knight, for the defendant in error.

27 BRADBURY, C. J. The sufficiency of the petition is the only question before the court here. The ²⁸ material averments thereof are as follows: In the year 1876, Jacob Borger, the ancestor of defendants in error, as principal, and the plaintiff in error as surety, executed a promissory note for two thousand dollars, payable in one year after date, to the Citizens' Sav-

ings and Loan Association of Cleveland, Ohio, and at the same time said Borger, to further secure the same, his wife releasing her right of dower, executed to said association a mortgage on certain real estate in the city of Cleveland, Ohio; that on May 12, 1883, after the note became due, the plaintiff in error delivered of his own funds the sum of two thousand dollars to said Borger, the principal debtor, with which to pay the note, and that Borger, pursuant to instructions of the plaintiff in error, afterward, on June 14, 1883, with the money thus furnished, paid off, took up, and retained in his possession said note; that the same was neither assigned to, nor came into the possession of, the plaintiff in error, nor has the mortgage ever been assigned to him.

It clearly appears from the foregoing statement that the plaintiff in error was the mere surety on the note in question; that he furnished the principal debtor with money with which to pay off the same, and that the principal debtor afterward applied the money to that purpose. In making the payment in the manner stated, the principal debtor should be regarded as the agent of the surety, and the payment ascribed to the latter precisely as if the latter had made the payment in person or by the hand of any other person than the principal debtor. The debt thus having been paid by the surety, he in equity became entitled to be subrogated to whatever securities the creditor had for the payment of the same debt: *Hill v. King*, 48 Ohio St. 75; *Dempsey v. Bush*, 18 Ohio St. 376; *Neal v. Nash*, 23 Ohio St. 483; *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110; *Burge on Suretyship*, 352, 353; *Sheldon on Subrogation*, c. 3; *Pomeroy's Equity Jurisprudence*, sec. 1419.

This principle is too firmly imbedded in our system of jurisprudence to require for its support a more extended citation of authorities. In the case at bar, the security was the mortgage given to secure the debt.

Upon the fact stated in the petition the plaintiff's right to subrogation is clear. However, that right accrued at the time he caused the note to be paid, and he suffered eleven years and six months to elapse before he began this action. The vital question, therefore, is not whether the right of subrogation accrued to him, but whether that right has been barred by the statute of limitations.

Many cases can be found where courts of high standing have held that where a surety pays a debt of the principal his remedy at law against the principal, or a cosurety, is by an action on an

implied contract of indemnity for money paid for the use of the principal or the cosurety. That such an action would be subject to the limitation fixed by the statute for actions on implied contracts, which in this state is six years, is quite clear. This view of the subject was adopted by this court as early as 1832, in the case of *Williams v. Williams*, 5 Ohio, 444, and subsequently approved in *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110. This doctrine was approved and applied by this court at its present term: *Poe v. Dixon*, 60 Ohio St. 124, post, p. 713.

In the case of *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110, it seems to have been the opinion of the majority ³⁰ of the court that the right of a surety to be subrogated to the rights of a creditor would be barred whenever his action at law for contribution would be barred, that is, by the limitation of six years. This view of the question finds considerable support both in reason and authority: *Joyce v. Joyce*, 1 Bush, 474; *Johnston v. Belden*, 49 Iowa, 301. By a still later case, however, *Neal v. Nash*, 23 Ohio St. 483, this court held that, where a surety in a judgment against himself and his principal pays the judgment debt, an action brought by him against his principal to be subrogated to the rights of the judgment creditor is limited by our statute to ten years. This holding, if adhered to conclusively, determines the question before us, for if the right to be subrogated to a judgment lien is limited to ten years, it would seem to follow as matter of course that the right to be subrogated to a mortgage lien would be subject to the same limitation, both being rights to equitable relief which have no other specific limitation attached to them by our statute, and, therefore, fall under the provisions of section 4985 of the Revised Statutes, which reads as follows: "An action for relief not hereinbefore provided for can only be brought within ten years after the cause of action accrues."

Counsel for plaintiff in error, however, contend that the holding in *Neal v. Nash*, 23 Ohio St. 483, that the limitation of ten years applied to the right of a surety to be subrogated to a judgment lien of the creditor, was obiter. It is true that the judgment rendered by this court in that case (*Neal v. Nash*, 23 Ohio St. 483), did not necessarily depend on the holding that the ten years' limitation applied. More than six and less than ten years had elapsed after the surety in that case (*Neal*) had paid the ³¹ judgment to which he desired to be subrogated, and the bringing of the action to obtain the subrogation, and, there-

fore, it was indispensable to his relief that his right of action should not be barred by the six years' limitation, and this court in maintaining this contention must of necessity so hold. But, as the facts in that case show that less than ten years had elapsed before the payment of the judgment and the bringing by the surety of the action for subrogation, it is obvious that the court having held that the right of action was not barred in six years, it became immaterial to the surety whether the ten years' statute applied to his case, or whether he could have maintained an action for subrogation at any time before the presumption of payment, owing to the lapse of time had attached to the judgment. Whatever the court might have held as between these two last periods of limitations, as his case did not fall within either of them, the holding could not affect him. Therefore, the contention of plaintiff in error that the holding of this court in that case (*Neal v. Nash*, 23 Ohio St. 483), as to the application of the ten years' limitation was obiter, finds support in the facts of the case. That case, however, may be regarded as a direct authority for the doctrine that, although an action at law upon the implied promise arising where a surety has paid the debt of his principal may be barred in six years after the payment, yet thereafter the surety may maintain an equitable action to be subrogated to any securities held by the creditor, notwithstanding the action at law has been thus barred.

Still further, although the holding under consideration in *Neal v. Nash*, 23 Ohio St. 483, may in strictness be obiter, nevertheless it bears the impress of ³² having been deliberately reached after full consideration by the able judges who then composed the court, and should not be lightly disregarded by us, their successors, when the question is again presented for consideration as the record before us does. By this action the plaintiff in error not only seeks to be subrogated to the rights of the creditor in the mortgage, but, when this is done, also to have the mortgage enforced for his indemnity.

By our practice, the statute of limitations may be invoked by a general demurrer where the lapse of time appears on the face of the petition: *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; *Keithler v. Foster*, 22 Ohio St. 27; *Vore v. Woodford*, 29 Ohio St. 248, 250; *Valley Ry. Co. v. Franz*, 43 Ohio St. 625.

As the petition in the case before us discloses that the action was begun more than ten years and less than fifteen years after the cause accrued, it is obvious its sufficiency in this respect depends upon which period of limitation is applied. If the plain-

tiff's right of action is limited to ten years from the accrual, it is barred. If he had fifteen years, it is not barred. The latter doctrine, i. e., that an action to be subrogated to any securities is not barred by the statute until an action on the security itself would be barred, rests upon the assumption that the act of payment by the surety ipso facto accomplished a complete subrogation; and upon the correctness of this assumption the plaintiff's contention depends. He contends through his counsel that the act of paying the debt of his principal of itself ipso facto, subrogated him to the rights of the creditor in the mortgage given to secure the debt, and that he is ³³ entitled to the same period within which to bring an action to foreclose it that the mortgagee himself would have had, which in this state is fifteen years: *Kerr v. Lydecker*, 51 Ohio St. 240.

This view of the question finds some support in certain declarations and expressions found in some of the text-writers and in the opinions of some careful and able judges. In *Tutt v. Thornton*, 57 Tex. 35, it is held that: "The payment of a note by a surety is not, as between himself and the principal, an extinguishment of the same, and his right of action against the principal is upon the note, and not on an implied assumpsit."

If a surety who pays a note may at law sue directly upon the note itself, it would seem to follow that the period of limitation fixed by the statute for actions on such instrument would be applicable. This holding, therefore, may be regarded, if not a direct authority, at least as in line with the doctrine for which plaintiff in error contends: *Sublett v. McKinney*, 19 Tex. 438.

This doctrine that a surety who has paid a note or other security may sue upon it directly in an action at law, we think, is in conflict with the weight of authority and with principle. His remedy is upon the implied contract of indemnity: *Ford v. Keith*, 1 Mass. 139, 2 Am. Dec. 4; *Bunce v. Bunce*, Kirby, 137; *Powell v. Smith*, 8 Johns. 249, 251; *Smith v. Sayward*, 5 Me. 504; *Hulett v. Soullard*, 26 Vt. 295; *Joyce v. Joyce*, 1 Bush, 474. It is certainly in conflict with the doctrine declared by this court in *Williams v. Williams*, 5 Ohio, 444, and in *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110. Nor does it find any support either in the opinion of Judge Minshall, ³⁴ who wrote the opinion of this court in *Hill v. King*, 48 Ohio St. 75, or in syllabus of the case. Subrogation there is not considered as a fact accomplished by the payment of the debt by surety, but simply as a right that may be enforced by a civil action. Where a surety, who pays a debt of his principal, takes from the

creditor an assignment of the securities the creditor held, there arises no necessity for an appeal to equity, for the surety, by the concurrent acts of himself and the creditor, has become vested with the legal title to the securities, and, under our system of jurisprudence, may sue on the securities in his own name. According to the doctrine that generally prevails, and, as we think, the better doctrine, where he has not taken this precaution, a surety cannot maintain an action at law on the security, for at law the payment extinguishes the security, whatever its nature may be, whether a note, a judgment, or a mortgage. In such case, it is those principles peculiar to our system of equitable jurisprudence that preserves the securities for the benefit of the surety and subrogate him to the rights of the creditor. This right of subrogation thus arising is purely and simply a creature of that system of jurisprudence to which it owes its existence. But for that system which we call equity the right of subrogation would not rise.

It is not a substantive tangible right of such nature and character that it can be seized and held and enjoyed independently of a judicial proceeding. It is a right in action only, that is, it must be established by a judicial proceeding. For this purpose, under our system, resort must be had to a civil action. By the commandment of our Code of Civil Procedure, as well as by those rules of pleading ³⁵ which have existed immemorially, the party is required to state the facts which show the right. Strictly speaking, there are two distinct causes of action in such cases—one consists of those facts that show the right of the plaintiff to be subrogated to the rights of the creditor in the securities held by the latter; the other consists of those facts which show that the security may be enforced against the principal. In the natural order of precedence, the party must establish his right to be subrogated to the security before he can be permitted to enforce it. If the facts alleged, and upon which the right of subrogation depends are denied, they must be established by proof as in any other civil action. In the case before us, if the right of subrogation is not established, the action fails and no relief can be granted.

We think, therefore, its primary purpose was to establish this right. The relief thus sought is clearly and undeniably equitable. It does not fall within any of the specific limitations prescribed by our statutes, and must be governed by the general provision of section 4985 of the Revised Statutes, which provides that all actions for "relief not hereinbefore provided for

shall be brought within ten years after the cause of action accrued.

Many cases can be found that bear upon the questions involved in this opinion, the decisions of which harmonize with the conclusion we have reached. Among them may be cited *Thayer v. Daniels*, 110 Mass. 345; *Bullock v. Campbell*, 9 Gill, 182; *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272; *Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119.

The determination of the question of the statute of limitations adversely to the contention of the plaintiff in error defeats his right of recovery, ³⁶ and renders unnecessary any consideration of the question respecting a defect of parties.

Judgment affirmed.

SURETYSHIP—SUBROGATION OF SURETY TO SECURITIES HELD BY CREDITOR.—A surety is entitled to the benefit of all securities in the hands of the creditor: *Mingus v. Daugherty*, 87 Iowa. 56, 43 Am. St. Rep. 354. A surety who pays the debt of his principal is entitled to be subrogated to the rights of the creditor, as against his principal and a cosurety: *Peebles v. Gay*, 115 N. C. 38, 44 Am. St. Rep. 429, and note.

SURETYSHIP—SUBROGATION OF SURETY—LIMITATION OF ACTIONS.—The statute of limitations begins to run against the right of sureties to be subrogated to the payee's right to securities, et cetera, from the time of the payment of the debt by them: *Extended note to Scott v. Nichols*, 61 Am. Dec. 505.

LIMITATIONS OF ACTIONS—DEMURRER.—The authorities are divided upon the question whether the defense of the statute of limitations can be raised by demurrer. That it can be so raised, see *Apalachicola v. Apalachicola Land Co.*, 9 Fla. 340, 79 Am. Dec. 284; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *McClenney v. McClenney*, 3 Tex. 192, 49 Am. Dec. 738. Contra, see *Gebhart v. Adams*, 23 Ill. 397, 76 Am. Dec. 702; *County of Wapello v. Bigham*, 10 Iowa, 39, 74 Am. Dec. 370; *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290.

POE v. DIXON.

[60 OHIO STATE, 124.]

VENDOR AND VENDEE—ASSUMPTION OF MORTGAGE—PRINCIPAL AND SURETY.—A grantee of land, who assumes as part of the purchase price to pay a debt secured thereon by mortgage, becomes the principal debtor with the grantor as his surety, although the latter is also personally bound to pay the debt.

SURETYSHIP—REMEDY OF SURETY.—A surety who has paid a debt for his principal may maintain an action on the implied promise of indemnity against the principal.

VENDOR AND VENDEE—ASSUMPTION OF MORTGAGE—RIGHTS OF MORTGAGEE.—If a grantee of land as-

sumes, as part of the purchase price thereof, to pay a debt secured thereon by mortgage, the promise thus arising runs to the mortgagee and not to the grantor, and the former, though not a party to the deed, and not knowing of such arrangement when it was made, may maintain an action on such promise when it comes to his knowledge.

VENDOR AND VENDEE—ASSUMPTION OF MORTGAGE—GRANTOR AS SURETY FOR GRANTEE—STATUTE OF LIMITATIONS.—If a grantee of land assumes, as part of the purchase price, to pay a debt secured thereon by mortgage, and the mortgage is foreclosed and the land sold to pay the debt, leaving unpaid a portion thereof which the grantor pays, he cannot maintain an action for indemnity on the recitals in the deed, but must resort to an action on the implied promise of indemnity by the vendee. Such cause of action accrues at the time that the grantor pays the debt, and is barred by limitation after the expiration of six years.

E. J. Hart and Burke & Ingersoll, for the plaintiff in error.

Dickey, Brewer, Bentley & McGowan, for the defendant in error.

128 **BRADBURY, C. J.** It appears by the record that for a valuable consideration plaintiff in error conveyed to the defendant in error certain real estate situate in the city of Cleveland, Ohio; that three mortgages were held against the land thus conveyed, for the payment of which the plaintiff in error, Poe, was personally bound by his having assumed their payment as part of the consideration for a former conveyance to him of the same premises; and that when he sold the premises to the defendant in error she assumed the payment of these identical mortgage debts as part of the consideration for the conveyance to her. The assumption by her of these mortgage debts was recited in the deed that conveyed the premises to her. This conveyance was made April 7, 1879. On the tenth day of June following, an action was begun by one of the mortgagees, which resulted in the foreclosure of the several mortgages and a sale of the premises on April 6, 1880, for a sum insufficient to pay the mortgage debts, which she had assumed as aforesaid, the deficiency amounting **129** to \$2,195.53. Mrs. Dixon failing to pay this deficiency, it was paid by the plaintiff in error at different times, the last payment being made on July 20, 1886. And on March 6, 1894, nearly eight years thereafter, he began this action to recover of her the aggregate amount thus paid, with interest on the respective payments from the time they were severally made.

This statement of facts shows that Mr. Poe, the plaintiff in error, had become personally bound for the payment of the

debts, although they were also secured by mortgages on the premises involved, and it further shows that Mrs. Dixon, the defendant in error, had, for a valuable consideration, assumed their payment. A novation was not effected, that is, the mortgage creditors did not accept Mrs. Dixon's promise to pay these debts in lieu of that of Mr. Poe, and discharge the latter. In fact, it does not appear that the creditors had any knowledge of the transaction. Mr. Poe, of course, could not shift from himself to her the obligation he was under to these creditors, except by their consent. He, therefore, also remained personally liable for the payment of these debts, notwithstanding he had procured her to assume them.

However, although he was still bound to the creditors, yet, as between himself and Mrs. Dixon, the debts became hers. This result follows from the application of the plainest principles of natural justice to the facts. He was bound for these debts, and, for a valuable consideration paid by him to her, she assumed to pay them and hold him harmless. The justness of requiring her to do this is so obvious that a rule of law which enforces that requirement needs no illustration or support ¹³⁰ from authority. Nevertheless, as it has received both illustration and support at the hands of the courts and authors, it may not be inappropriate to refer to some of them: *Paine v. Jones*, 76 N. Y. 274; *Cornell v. Prescott*, 2 Barb. 16; *Comstock v. Drohan*, 71 N. Y. 9; *Calvo v. Davies*, 8 Hun, 222, 73 N. Y. 211, 29 Am. Rep. 130; *Shepherd v. May*, 115 U. S. 505; *Flagg v. Geltmacher*, 98 Ill. 293; 24 Am. & Eng. Ency. of Law, 792; *Brant on Suretyship*, sec. 295; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Ellis v. Johnson*, 96 Ind. 377.

As between themselves, the one who has thus assumed the debt is regarded as the principal debtor and the other as a surety, and they respectively incur the obligations and acquire the rights that are by law attached to the relation each occupies: 24 Am. & Eng. Ency. of Law, 719; *Flagg v. Geltmacher*, 98 Ill. 293; *Bayless on Sureties and Guarantors*, 490; *Comstock v. Drohan*, 71 N. Y. 13; *Cornell v. Prescott*, 2 Barb. 16; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Huyler v. Atwood*, 26 N. J. Eq. 504.

The authorities supporting this proposition are numerous, but a further citation of them is unnecessary.

The plaintiff in error, therefore, when he paid the deficiency before alluded to, was entitled to reimbursement from the defendant in error. This deficiency, however, he paid in

installments, and nearly eight years elapsed between the last payment and the commencement by him of the present action to obtain indemnity. This lapse of time appeared on the face of the petition. The six years' statute of limitation was invoked by a demurrer to the petition, a practice recognized in ¹³¹ this state. The chief contention made by counsel was over this question. Our statute limiting the commencement of actions provides (Rev. Stats., sec. 4980): "An action upon a specialty or an agreement, contract, or promise in writing," shall be brought within fifteen years "after the cause of action accrues." Section 4981 of the Revised Statutes provides: "An action upon a contract not in writing, either expressed or implied," shall be brought within six years "after the cause of action accrues." The authorities are quite numerous in holding that a surety who has paid a debt for his principal may maintain an action on the implied promise of indemnity. The security having paid a debt which the principal ought to have paid, the law raises (or implies) a promise on the part of the principal to reimburse the surety, and the latter may maintain an action on the implied promise as for money paid for the use of the principal: *Hill v. Wright*, 23 Ark. 530; *Appleton v. Bascom*, 3 Met. 169; *Holmes v. Weed*, 19 Barb. 128; *Tom v. Goodrich*, 2 Johns. 213; 1 *Brandt on Suretyship and Guaranty*, 205-207; *Huntley v. Sanderson*, 1 *Crompt. & M.* 467; 2 *Barn.* 26.

Any further citation of authorities in support of a rule of law so firmly lodged in the jurisprudence of England and America is unnecessary, even if it had not been heretofore recognized by this court. It is, however, as firmly established here as in the other states of the Union: *Williams v. Williams*, 5 Ohio, 444; *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Oldham v. Broom*, 28 Ohio St. 41.

The rule that the period of limitation fixed for beginning an action of this kind is the same that ¹³² applies generally to other actions upon implied and unwritten contracts, is also generally recognized: *Bayless on Sureties and Guarantors*, 335; *Sherrod v. Woodard*, 4 Dev. 360, 25 Am. Dec. 714; *Thayer v. Daniels*, 110 Mass. 345. This rule prevails in this state, and the period as fixed by statute above cited in six years: *Neilson v. Fry*, 16 Ohio St. 553, 91 Am. Dec. 110. Plaintiff in error, however, through his counsel, contends that he is not compelled to resort alone to an action as an implied promise, but

may maintain an action on the recital in the deed, and that the present action is so founded. This contention must be made good in order to avoid the bar of the six years' statute, which it is seen would otherwise apply.

The obligation of Mrs. Dixon, the principal in this case, was in writing; that is, it was embodied in the form of a recitation in the deed made to her for the premises on which the debts were secured by mortgage liens. The deed had not been recorded and was not produced at the trial, but, as near as can be ascertained from parol evidence of its contents, the recitation was substantially as follows: "The premises are subject to mortgages and notes to the amount of \$—— with interest . . . which the grantee assumes to pay." Pay to whom? To the creditors, or the persons who held the notes and the mortgages. It was not a promise to pay anything to the plaintiff in error. Doubtless, he might have taken from her a written undertaking to himself binding her to pay the creditors the debts involved, with a stipulation therein that if she did not, and he was compelled on that account to pay them, that she would repay him the amount thus paid. That, of course, would fix on her a written obligation to indemnify ¹³³ him which we may concede would not be barred until fifteen years after it had accrued, as provided by section 4980 of the Revised Statutes, before quoted. This, however, he did not do, and must, therefore, rely on the recitation in the deed. This recitation, as already stated, contained no promise to pay anything to the plaintiff in error. It was a promise to pay a debt to the creditors. It inured to each of them severally, and each could have maintained for the recovery of his claim a separate action against Mrs. Dixon on the promise: *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Emmitt v. Brophy*, 42 Ohio St. 82; *Thompson v. Thompson*, 4 Ohio St. 333.

But examine the promise in any way one may choose, and no promise to the plaintiff in error will be found. True, the relation of principal and surety was established between the plaintiff and the defendant from the time she assumed the payment of debts involved in the case. Her duty or obligation to indemnify him, in case he afterward paid the debts, arose at the moment the relation was established. It sprang from the assumption, for a valuable consideration, of those debts. It is a consequence that attaches to the relation of principal and surety in every instance, however that relation may have been created: 24 Am. & Eng. Ency. of Law, 774, 775; *Rice v.*

Southgate, 16 Gray, 142; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Barney v. Grover, 28 Vt. 391; Martin v. Ellerbe, 70 Ala. 327; Ward v. Henry, 5 Conn. 596, 13 Am. Dec. 119.

The authorities say that, under certain conditions, and at any time after the relation is established and the debt has become due, the plaintiff in error could have maintained in equity an action to compel her to pay these debts, and thus relieve ¹³⁴ him from liability on their account: 24 Am. & Eng. Ency. of Law, 789, and note 1. This also is an incident that necessarily attaches to the relation, and the right of the plaintiff in error in this respect does not differ from what it would have been had he signed a promissory note or a bond as the surety of Mrs. Dixon. In such cases, as well as in the present case, the promise runs to the creditor, and in all three cases the relation of principal and surety arose when the promise to the creditors was made, and the obligation of the principal to indemnify the surety, if he afterward paid the debt, came into existence at the same instant. The circumstances that the promise was embodied in a deed is not material. It would have been equally binding on Mrs. Dixon, equally beneficial to the creditors, and equally potent to create between her and the plaintiff in error the relation of principal and surety if it had been accomplished by a separate instrument executed by Mrs. Dixon to the creditors in which the name of Mr. Poe did not appear. Mrs. Dixon did not sign the deed. It was a deed poll, executed by the grantors only, and the recitation involved here was binding on her only because she accepted and held under the deed that contained it. True, Mr. Poe had a deep interest in her fulfilling the promise, but it was no greater and no different from what that interest would have been if the promise had been embodied in a bond, note, or other writing which bound her directly to those creditors.

Whatever other rights may have accrued to the plaintiff in error on account of the transaction, or to whatever stage of such transaction his right to ultimate indemnity in case he paid the debt, had ¹³⁵ its origin, it is obvious that his right to call upon Mrs. Dixon to refund what he had paid in her behalf did not accrue to him until he had paid the debt or some part of it, which, as between themselves, she ought to have paid. Such payment is a prerequisite to his right to be reimbursed. Before he made it, he could not have maintained an action for reimbursement. As soon as it was made, his right of action was complete.

We are, therefore, constrained to hold that the cause of action being for reimbursement, and arising out of the implied contract to indemnify that inheres in or attaches to the relation of principal and surety accrued when the payments were made, and in six years thereafter was barred by section 4981 of the Revised Statutes.

Judgment affirmed.

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE—GRANTEE AS PRINCIPAL.—A grantee who covenants with the grantor to pay off a mortgage on the premises becomes, in equity, the principal debtor with respect to the mortgage debt: Note to *Enos v. Sanger*, 65 Am. St. Rep. 40; *Klapworth v. Dressler*, 2 Beasl. 62, 78 Am. Dec. 69, and monographic note thereto treating the entire question of the assumption of a mortgage by a grantee and the rights and liabilities of the parties arising therefrom. See the extended note to *Fiske v. Tolman*, 26 Am. Rep. 660.

SURETYSHIP—REMEDY OF SURETY.—A surety who has paid a note or other security for his principal cannot sue upon it directly in an action at law. His remedy is upon the implied contract of indemnity: *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707.

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE.—RIGHT OF MORTGAGEE to sue a grantee upon a promise to pay the mortgage debt: Monographic notes to *Baxter v. Camp*, ante, p. 169; *Klapworth v. Dressler*, 78 Am. Dec. 73-78. That a mortgagee has no right of action against the grantee, see *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225, and note. Contra, *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467.

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE—GRANTOR'S REMEDY AGAINST GRANTEE.—An agreement by a vendee that he will pay a mortgage existing on the land purchased is binding, if such mortgage forms a part of the price of the land; and, if the vendor subsequently pays the same, by virtue of his personal liability, assumpsit for money had and received lies: *Kearney v. Tanner*, 17 Serg. & R. 94, 17 Am. Dec. 648; *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804. That the grantor may sue the grantee before he has paid the debt, see *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341.

EX PARTE JENNINGS.

[60 OHIO STATE, 319.]

DEPOSITIONS—REFUSAL TO TESTIFY—CONTEMPT—HABEAS CORPUS.—A witness is entitled to be discharged on habeas corpus when he has been committed for contempt by a notary public or other officer for refusing to testify to facts for the purposes of a deposition that are incompetent and inadmissible in evidence, and detrimental to his business.

Malcom Jennings was committed for contempt, before a notary public, in the matter of a deposition while he was a witness, in refusing to furnish a list of papers, circulating in Ohio, with which he had contracts to print and furnish advertisements, and reading notices not to appear as advertisements, with the Buckeye Pipe Line Company. The witness refused, upon the ground that the facts sought were not pertinent to the case in which the deposition was taken, and that the disclosure would be detrimental to his business. He petitioned to be discharged from custody by writ of habeas corpus.

V. P. Kline and L. T. Neal, for the petitioner.

F. S. Monnett, attorney general, E. B. Kinkead and S. W. Bennett, for the relator.

328 SHAUCK, J. Authority to punish, as for a contempt, a witness who refuses to answer "when lawfully ordered" is conferred upon notaries public by sections 5252 and 5254 of the Revised Statutes: *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692. The denial here is not of the power of the officer, but of the lawfulness of the occasion for its exercise. The taking of testimony by depositions is authorized with much detail in the provisions of our statutes relating to civil procedure. The general provision is, that "the testimony of witnesses may be taken" in this mode. The purpose is to present to the court upon the trial of issues of fact the testimony of witnesses unavoidably absent as though they were present, and the power to punish those who refuse to appear or to testify is conferred to effectuate that purpose. The language of the section conferring authority upon the officer to punish a witness for refusing to answer "when lawfully ordered" implies that punishment cannot be imposed for every refusal.

It is familiar that an objection to the competency of the evidence to be elicited, when interposed by **329** a party to the action in which the deposition is taken, cannot be either sustained or overruled by the officer. In such case, the question

of competency is for the court. But it seems quite consistent with the purpose for which depositions are taken that a witness may refuse to make disclosures which would operate to his personal prejudice without aiding the court in determining the rights of the parties, by reflecting either upon the issues in the case or upon the credibility of the witness. Accordingly, the settled law upon the subject is as stated in *Church on Habeas Corpus*, section 319: "The law has not invested such officers [notaries public] with arbitrary and omnipotent power to compel a witness to answer all questions, however incompetent, irrelevant, immaterial, or inadmissible. A refusal to answer such questions is not necessarily a contempt. To have power to commit for contempt, the notary must exercise his functions substantially in the manner and under the circumstances prescribed and contemplated by law. It has, therefore, been held that a witness will be discharged on habeas corpus where he has been committed for contempt by a notary public for failing or refusing to produce papers and testimony that are incompetent and inadmissible": *Proffatt on Notaries*, sec. 31; *In re Beardsley*, 37 Kan. 666; *Ex parte Krieger*, 7 Mo. App. 637.

The conclusions stated must be sound, unless the officer taking a deposition is released from limitations which the law imposes upon the authority of the judge before whom it is to be read, since a witness examined in court is not guilty of contempt in refusing to answer an incompetent question: *Ex parte Zeehandelaar*, 71 Cal. 238; *People* ³³⁰ v. *Kelly*, 24 N. Y. 74. In *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, so confidently relied upon to justify this imprisonment, it was clearly pointed out in the opinion that the question which the witness refused to answer was competent. Indeed, it does not seem to have been finally determined in any case that the personal liberty of the citizen is of so little importance that it should yield to a desire to gather food for idle gossip.

Are the facts which the witness refused to furnish relevant to the issues in the case in which the deposition is to be read? Is there reason to suppose that our minds so operate that, in determining whether the pipe line company has entered into an unlawful compact with other corporations to extort unreasonable prices for the products of petroleum, we can be aided to a conclusion by knowing whether this witness has entered into more or fewer contracts of the character indicated, or by

having the names of the papers which have entered into such contract relations with him? If we should attend to all that might be said in criticism of journalism which publishes advertising matter without distinguishing marks, or of the reprehensible practice of creating public sentiment, by either party, for its supposed influence in the judicial determination of causes, we should be no nearer to a conclusion upon the issue of fact. That can be reached only by a consideration of evidence tending to establish or refute the allegations of the state.

With respect to the suggestion of the attorney general, that the evidence would tend to show that there has been a contempt of this court, it seems to be sufficient to say that the court should, and will, take the responsibility of instituting such ³³¹ inquiries as it may deem necessary to the preservation of its dignity and the orderly character of its proceedings. There can be no issue of that character until it is ordered by the court.

We do not suppose that any interest which the witness may have in concealing the facts which the question propounded was designed to elicit would excuse him from answering, if the facts were relevant to the issues in the case on trial; nor that the sincerity of his belief that the facts are irrelevant would shield him from imprisonment if the court should be of the opinion that they are relevant. If he refuses to answer upon the ground that the answer is incompetent, he does so at his own peril. It seems, however, entirely clear that in this case the opinion of the witness as to the irrelevancy of the question is correct.

Petitioner discharged.

NOTARIES—POWER TO PUNISH FOR CONTEMPT.—A notary public may be authorized to punish a witness for contempt in refusing to answer a material question on the taking of a deposition: *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, and note. A witness is guilty of contempt in refusing to answer a question, if it does not involve any question of privilege on his part, and the notary determines it to be competent: *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692. That notaries cannot be given the power to punish for contempt, see *In re Huron*, 58 Kan. 152, 62 Am. St. Rep. 614, and note.

STUTS v. STRAYER.

[60 OHIO STATE, 281.]

SURETYSHIP — DISCHARGE — INDEPENDENT CONTRACT.—A surety is not discharged by an independent contract between the principal parties, although it may be contemporaneous with, and relate to, the same subject as the sureties' contract, without varying the terms thereof. To discharge the surety such variation must be in the terms of the contract by which the surety is bound.

West & West, for the plaintiff in error.

Howenstine & Huston and A. J. Miller, for the defendant in error.

³⁸⁷ **SHAUCK, J.** The judgment recovered by the plaintiff at the October term, 1895, of the common pleas court should have been affirmed by the circuit court, unless the facts alleged in the second defense are sufficient in law to defeat a recovery. Whether they are sufficient or not was, and continues to be, the only question of substance in the case. Those facts, briefly stated, are that the notes described in the petition were executed by the principal and his sureties in consideration of the purchase of chattels sold by the payee to the principal; that by their terms they were to bear but six per cent interest after their maturity, instead of eight per cent as required by the contract of sale, and that at the time of the delivery of the notes the principal, in response to the demands of the payee, executed his individual separate obligation in writing to pay the higher rate agreed upon after maturity, and that this was done without the knowledge of the surety. In support of the judgment of the circuit court, it is said that the two instruments, being contemporaneous and having relation to the same contract of sale, are to be construed together, and, being so construed, there appears to be a change in the contract. Although these contracts are contemporaneous, they are not between the same parties. By the second instrument, the principal debtor assumed an independent obligation to pay the interest required by the original contract of sale and not embraced in the terms of the note executed by the principal and sureties, without in any manner ³⁸⁸ attempting to effect a change in the contract to which the sureties were parties. The general rule upon the subject as stated in *Brandt on Suretyship*, section 378, is familiar and accurate: "Any agreement between the creditor and principal which varies essentially the terms

of the contract by which the surety is bound without the consent of the surety will release him from responsibility." The condition that to discharge the surety the variation must be in "the terms of the contract by which the surety is bound" is indispensable.

The judgment of the circuit court at its February term, 1896, is reversed, and that of the common pleas court at its October term, 1895, is affirmed.

SURETYSHIP—DISCHARGE—NEW AGREEMENT.—If a new contract between the principal parties adds no new terms to the original contract, and it is in no respect modified, and the last undertaking in no way increases the difficulty or expense, or tends to delay the work embraced in the first contract, the surety is not released: *Note to First Nat. Bank v. Gerke*, 6 Am. St. Rep. 460; *note to Scott v. Fisher*, 28 Am. St. Rep. 691; *Phoenix Brewing Co. v. Rumbarger*, 181 Pa. St. 251, 59 Am. St. Rep. 647; see the extended note to *Fassnacht v. Emsing Gagen Co.*, 63 Am. St. Rep. 327, on what matters existing at or prior to entering into a contract of surety or guaranty will discharge the surety or grantor.

GLADWELL v. HOLCOMB.

[60 OHIO STATE, 427.]

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.—NOTICE TO QUIT is not necessary to terminate a tenancy from year to year arising from the tenant holding over after the expiration of his term.

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—HOLDING OVER.—A tenant for a year holding over with the assent of his landlord after the expiration of the lease becomes a tenant from year to year, upon the terms, and subject to the conditions, of the original lease.

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—ELECTION OF LANDLORD—NOTICE TO QUIT.—If a tenant for a year holds over after the expiration of his term, the landlord may elect to treat him as a tenant for another year, or as a trespasser, and, in the latter case, may maintain ejectment against him without notice of his intention not to prolong the tenancy or he may maintain an action of forcible detainer, without notice to the tenant to quit the premises, except the statutory written notice of three days required by statute.

LANDLORD AND TENANT—PAROL AGREEMENT FOR LEASE—STATUTE OF FRAUDS.—A parol agreement for a lease to begin at a future date to a person already in possession as a tenant, is within the statute of frauds.

A. W. Eckert, for the plaintiff in error.

Smith & Beckwith and W. G. Denman, for the defendants in error.

⁴³¹ WILLIAMS, J. On the fifteenth day of December, 1889; Horace Holcomb, then the owner of a storeroom on Monroe street, in the city of Toledo, executed a lease of the same to Thomas J. Gladwell for the term of one year commencing on the first ⁴³² day of January, 1890; the lessee agreeing to pay as the rent therefor the sum of three hundred and sixty dollars, in monthly installments of thirty dollars each on the first day of each month during the term, and further agreeing to surrender possession of the premises at the end of the term to the lessor, his heirs or assigns. The lessee occupied the premises and paid the rent according to the lease during the term, and continued to hold over and pay rent at the same rate from year to year thereafter, until and including the year 1896. On the thirty-first day of August, 1896, the lessor having then died intestate, his heirs, to whom the estate descended, served the tenant with a written notice to yield possession to them on the first day of January following. The tenant, having failed to comply with that notice, and with the further notice, required by the statute, to leave the premises within three days, which was served on him on the second day of January, 1897, the heirs of Holcomb brought their action of forcible detention against him, before a justice of the peace of Lucas county. That action was defended on the grounds: 1. That the tenancy having become one from year to year, after the expiration of the lease, could not be determined by the complainants without a notice to that effect given six months previous to the end of the year; and 2. That the tenant, during his occupancy, had a verbal contract with the lessor for a further lease of the premises for the period of ten years. The justice instructed the jury that six months' notice was not necessary to the determination of the defendant's tenancy, and, that the verbal agreement, if one was made, was invalid. A verdict was returned against the defendant on which judgment of restitution was ⁴³³ rendered in favor of the complainants. The defendant, claiming there was error in the instructions of the justice to the jury, sought to have the judgment reversed; but it was affirmed in the court of common pleas, whose judgment was affirmed by the circuit court; and the two questions arising upon the charge are presented for decision by this court.

That Gladwell's occupancy of the premises by holding over with the assent of his landlord after the expiration of the lease became a tenancy from year to year upon the terms and subject to the conditions of that lease is settled by the recent case

of Baltimore etc. R. R. Co. v. West, 57 Ohio St. 161. But what notice, if any, is requisite to the termination of a tenancy of that nature by either party without the consent of the other, has not, as far as we have been able to discover, been considered in any reported decision of this court.

It is not doubted that when the time of the termination of a tenancy is definitely fixed, the landlord, upon the expiration of that time, may maintain an action for possession without any notice to quit except the three days' notice required by the statute; nor, generally, that upon the termination of a farming lease of uncertain duration, otherwise than for his own default, the tenant is entitled to emblements. Leases of this latter class, though strictly creating tenancies at will, were early construed by the English courts into tenancies from year to year, when a periodical rent was paid; and out of them and of leases that by their terms were to continue from year to year, grew the common-law rule requiring notice from the party desiring to bring the tenancy to ⁴³⁴ an end. That rule rests upon the presumed intention of the parties that such tenancy should be prolonged for an indefinite number of years, and that, so being of uncertain duration, either party should have reasonable notice, before the expiration of any year, of the other's intention to end it. In agricultural tenancies, the notice was fixed at six months, in order that the tenant might be enabled to reap, before he should be dispossessed, the crops which he had sown; though Mr. Justice Wilmot, in *Timmons v. Rowlinson*, 3 Burr. 1693, 1699, is authority for the statement that the notice required "varied according to the custom of different counties." The rule was afterward extended, without apparent reason, to like tenancies of tenements, and of other property not used for agricultural purposes. It has, in this enlarged application, varying as to the length of the notice required, been adopted in some of the states by statute, and in others by adjudication of their courts; but has not hitherto obtained in this state, where the doctrine of emblements in cases of farming tenancies of indefinite duration has been adhered to. A distinction has been made between those tenancies from year to year from which, as has been seen, the rule requiring notice to quit had its origin, and those arising from a holding over by the tenant after the expiration of a lease for a specified term. In each year of occupancy under the former, there is, it is said, a growing interest in the ensuing year springing out of the original contract; while in the latter

case, a new contract arises each year of the holding over, by implication from the conduct of the parties. This distinction is pointed out in the opinion of Chief Justice Marshall, in *Alexander v. Harris*, 4 Cranch, ⁴³⁵ 299, 302, in showing that a plea of a demise for three years is not supported by proof of a lease for one year and a holding over for two years thereafter. It is there said: "The lease stated in the avowry is obviously a different lease from that which was given in evidence. A lease for three years is not a lease for one year. But it is contended that a subsequent possession, without any new express agreement amounts to an extension of the original lease, and for this Bacon's Abridgment, and a dictum of Judge Buller, in the case of *Birch v. Wright*, 1 Term Rep. 378, have been cited. But those cases do not prove the point they were supposed to establish. In the cases, the original terms of the lease admit of the extension which was afterward made by consent of parties. The lease was made for one year, and afterward from year to year, as long as both parties should please. The principle of continuance is introduced into the original contract, and the occupation for three years is evidence that the circumstance had occurred, by force of which the contract should be a lease for three years. But in this case the original contract contains no principle of continuance. It is for a limited time, and can only be extended by a new contract, either express or implied." A similar view of the contract arising each year that the tenant holds over beyond the term of his lease, was expressed by this court in *Baltimore etc. R. R. Co. v. West*, 57 Ohio St. 161, 168, where, as showing that such a contract does not fall within the statute of frauds, it is said: "The tenant, by holding over, is regarded as consenting or proposing to enter upon a new term for another year at the same rent and upon the conditions of the prior occupancy, and the landlord's acceptance of the proposed ⁴³⁶ tenancy is presumed from his receiving the rent, or other acquiescence. The agreement arises by implication of law from the conduct of the parties after the expiration of the former tenancy; and, in this respect, is essentially different from those agreements made by parties while in possession under an existing lease, for a new lease to commence in the future; as was the case of *Armstrong v. Kattenhorn*, 11 Ohio, 265, and *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103. Here the new agreement grows out of, and is founded upon, the possession evidenced by the holding over, and is therefore referable to it, rather than to the possession under the prior agreement which

had expired. The holding over is equivalent to a new entry."

As the assent of both parties is necessary to the creation of this new contract at the beginning of each year, it is obvious that if the tenant chooses not to hold over, and vacates the premises at the end of any year, the tenancy ceases without liability for rent for the ensuing year, though no notice of his intention to remove be given, as certainly as it does upon the expiration of a lease expressly made for a specific term. So it does, though he hold over, unless the landlord chooses to accept him as a tenant for another year. By remaining in possession without any new arrangement, the tenant is regarded as offering to take the premises for another year upon the terms of his tenancy which has just expired. But the landlord is not bound to accept the offer; and, unless he does so, by receiving rent, or some other act of assent or acquiescence, the tenancy is thus terminated, and notice of his intention not to renew it for another year is unnecessary. The holding over after the end ⁴³⁷ of any year, without the landlord's consent, is equivalent to holding over after the expiration of a lease for a specific term. And, if the landlord does not choose to accept the proffered tenancy for another year, he is at liberty to treat the occupant as a trespasser, and may maintain ejectment against him, without previous notice of his intention not to prolong the tenancy. This result necessarily follows from the fact that the tenancy terminates at the close of the year, unless the parties, by some new agreement, express or implied, extend it for a longer period. Some of the authorities on this subject are referred to in *Baltimore etc. R. R. Co. v. West*, 57 Ohio St. 161, and there are numerous others. It is not readily seen how, otherwise, such a tenancy could escape the statute of frauds. If six months, or any number of months' notice, before the end of the year were required to terminate the tenancy, then, upon the failure to give such notice a new implied agreement, with the tenant in possession under a former one would immediately arise, for another year commencing in the future, which could not less certainly be obnoxious to the statute than an express parol agreement for a future lease; and an agreement of that kind not accompanied with actual possession taken under it has been repeatedly held invalid. Our statute authorizes a suit in forcible detainer, in all cases without exception, against tenants who hold over their term; and no notice is necessary before the commencement of the suit, ex-

cept a written notice to leave the premises within three days after its service. This requirement was complied with.

Judgment affirmed.

LANDLORD AND TENANT—HOLDING OVER—NOTICE TO QUIT.—A tenant who holds over after the expiration of his term becomes a tenant by sufferance, and is not entitled to notice to quit: Extended note to Daniels v. Brown, 69 Am. Dec. 509. Tenants from year to year are generally entitled to notice to quit: Monographic note to Stedman v. McIntosh, 42 Am. Dec. 126.

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—HOLDING OVER—ELECTION OF LANDLORD.—The general rule is, that if a tenant for one or more years holds over at the expiration of his term, the landlord may treat him as a trespasser or as a tenant for another year, upon the terms of the prior lease, as far as applicable. The option to regard the holding as that of a trespasser, or as a tenant for another year, is with the landlord, and not with the tenant, and the latter holds over at his peril: Haynes v. Aldrich, 133 N. Y. 287, 28 Am. St. Rep. 636, and note; Mason v. Wierengo, 113 Mich. 151, 67 Am. St. Rep. 461.

LANDLORD AND TENANT—HOLDING OVER—TERMS.—A tenant from year to year, holding over without any new stipulations between the parties, impliedly holds subject to all the covenants in his expired contract or lease: Vrooman v. McKaig, 4 Md. 450, 59 Am. Dec. 85; Haynes v. Aldrich, 133 N. Y. 287, 28 Am. St. Rep. 636.

NELSON BUSINESS COLLEGE COMPANY v. LLOYD.

[60 OHIO STATE, 448.]

MASTER AND SERVANT—MASTER'S LIABILITY FOR MALICIOUS ACTS OF SERVANT.—A master is liable for willful or malicious, as well as for negligent, acts of his servant, done in the course of his employment and within the scope of his authority.

MASTER AND SERVANT—SERVANT, WHEN IN COURSE OF EMPLOYMENT—QUESTION FOR JURY.—In an action seeking to hold the master liable for an act of his servant, which, from its nature, is within his employment, the question is whether it was in fact done in the performance of his service to his master, or was done wholly for the purpose of injuring the plaintiff, and none other, that question must be determined by the jury.

MASTER AND SERVANT—MOTIVE FOR ACT OF SERVANT, WHEN QUESTION FOR JURY.—If, in an action seeking to hold a master liable for the wrongful act of his servant, performed in the course of his employment, the evidence is such that different minds may fairly draw different conclusions as to the real motive and purpose of the servant in committing such act, the question of such motive must be determined by the jury under proper instructions, and it is error, in such case, for the trial court to direct a verdict for the defendant.

W. C. Cochran, for the plaintiff in error.

W. M. Eames and W. E. Bundy, for the defendant in error.

⁴⁵² MINSHALL, J. In the original suit, the plaintiff sought to recover of the defendant damages for injuries occasioned him by one of its servants, acting in the capacity of janitor, the averment being that the janitor being then and there engaged in the performance of his duties as such, "assaulted the plaintiff, and violently, wrongfully, recklessly and carelessly caused a ladder on which he was lawfully engaged at work in the schoolroom of the defendant, to be overturned" whereby he was violently thrown to the floor and seriously injured. On the trial to a jury, at the close of the plaintiff's ⁴⁵³ evidence, the court, on motion of the defendant, instructed the jury to render a verdict for the defendant which was done. A motion for a new trial was overruled, exception taken, and judgment rendered on the verdict. A bill of exceptions, containing all the evidence, was also taken and made a part of the record. On error to the circuit court the judgment was reversed for error in directing a verdict for the defendant; and the question is now presented to this court, whether the trial court erred in directing a verdict for the defendant on the evidence produced by the plaintiff.

The evidence offered tended to show that the plaintiff had been called by the company for the purpose of repairing an electrical light in a room of the college, and was so engaged at the time he was thrown from the ladder to the floor by the act of the janitor and injured. It also tended to show that the janitor was, at the time, engaged in the performance of his duties, cleaning up the room, and this required the moving of the tables from one part of the room to another. The ladder had been placed on one of these tables, so that the light that needed repair could be reached. That the janitor, being delayed in his work by the time taken to repair the light, became impatient, and demanded the plaintiff to get down; he was told that it would only take a few minutes, but he was unyielding, and violently shoved the table, with the result before stated.

It would seem that there cannot be much doubt that the janitor was at the time engaged in the performance of his duties, or, at least, that that question should have been submitted to the jury. He had, for the time being, the custody of the room, ⁴⁵⁴ and was engaged in cleaning it up and putting it in order for use that evening, which, as before stated, required the moving of tables from one part of the room to another. There was some evidence that the janitor had an ill-will against

the plaintiff, and availed himself of this opportunity to injure him. If this were so, and the act was done with no other purpose, it was a clear departure from his employment, and the master is not liable: *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 473. Whether the act was done with this purpose or not was certainly a matter for the jury to determine, upon a consideration of all the evidence. The manner and character of the witnesses testifying in this regard, might largely influence the jury in arriving at a conclusion on the subject.

Notwithstanding some earlier cases, it is, we think, clearly settled that the master is liable for the willful, or even malicious, as well as negligent acts of a servant, done in the course of his employment and within the scope of his authority: *Mecham on Agency*, sec. 740, 741; *Smith on Master and Servant*, 151.

Among the older cases on the subject and which have frequently been followed, are *McManus v. Crickett*, 1 East, 106, where it was held that the master was not liable for the act of his servant in purposely driving his chariot against the chaise of the plaintiff, the master not being present; and *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, where it was held on the authority of the previous case, that a father was not liable for the willful acts of his son in running over a small boy while driving the wagon of the father, the latter not being present. In these cases, and those following them as precedents, it is held that the master is liable only for the negligent ⁴⁵⁵ acts of his servant done in the course of his employment and the scope of the authority conferred; and that, in the absence of evidence, he cannot be supposed to have authorized the doing of a willful or malicious act. This, as observed by Chief Justice Ryan, in *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, seems an unnecessary subtlety for, by a parity of reasoning, a master should not be held for the negligent acts of his servant, though done in the course of his employment, since it could hardly be presumed that any master would authorize negligence on the part of his servant, in conducting his business, any more than he would malice or willfulness; and such, it would seem, as observed by Chief Justice Ryan, was the ground of the decision in *Middleton v. Fowler*, 1 Salk. 282, which was a case for negligence, where it is said, "no master is chargeable with the acts of his servant, but where he acts in the execution of the authority given him,"

and he remarks that it is a singular commentary on the subtleties of *McManus v. Crickett*, 1 East, 106, that *Middleton v. Fowler*, 1 Salk. 282, is the only adjudged case cited to support it.

In *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, it is said, that "the dividing line is the willfulness of the act." The great weight of modern authority and reason is against this as the proper distinction. The learned judge just referred to, after an elaborate examination of the cases, and the reason of the rule, respondeat superior, observes that: "In spite of all the learned subtleties of so many cases, the true distinction ought to rest on the condition whether or not the act of the servant be in the course of his employment": *Craker v. Chicago etc. R. R. Co.*, 36 Wis. 659, 17 Am. Rep. 504; *Redding v. South Carolina R. R. Co.*, 3 S. C. 1, 16 Am. Rep. 681. The learned author, whose work on Agency we have cited above, makes this ⁴⁵⁶ comment: "It does not follow, by any means, from this rule that the principal is liable for any willful or malicious act of his agent, but only for those which are committed by the agent while acting in the course of his employment and within the scope of his authority. At the same time, it is not to be inferred that the principal's liability depends upon whether he has or has not intentionally authorized the doing of the wrongful act. If he has done so, he is, of course, liable. But what is meant, is, that if the agent, while engaged in doing something which he is authorized to do and while acting in the execution of his authority, inflicts an injury on a third person, though willfully or maliciously, the principal is liable. But if, on the other hand, the agent steps aside from his employment to do some act having no connection with the principal's business, and to which he is inspired by pure personal and private malice or ill-will, the principal is not liable." The author then gives many instances in which the master has been held liable for the willful acts of his servant. For example: Where the engineer of a locomotive wantonly and maliciously sounded the whistle so as to frighten the horse of a traveler on the highway, causing it to run away and injure him; where an engineer purposely ran down and killed the plaintiffs' cattle; where an agent, in the course of his employment, instituted a malicious prosecution; where a railway brakeman assaulted and grossly insulted a passenger, upon the false pretense that he had not surrendered his ticket; where, under like circumstances, the conductor willfully and wrongfully caused a pas-

senger to be ejected from the train; where the servant and some of the table-waiters upon a passenger boat, wrongfully and without provocation, assaulted a ⁴⁵⁷ passenger; where the conductor of a passenger train kissed a female against her consent; where a brakeman struck a passenger in the face with a lantern because the passenger, who had lost his watch, said he thought the brakeman had it; where the driver of a street railroad car maliciously assaulted a passenger because he expostulated with the driver about an assault made by him upon another person outside the car; and where a railway brakeman made a malicious assault upon a passenger who attempted to enter the wrong car. He then refers to the Ohio case of Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373, and distinguishes it as a case "where a prospective passenger, while seeking to get his trunk checked, provoked a personal quarrel with the baggage-master, and was struck by the latter as an act of personal resentment," and the company was held not liable. This case, and that of Stranahan etc. Co. v. Coit, 55 Ohio St. 398, may be regarded as standing at the opposite extremities of the master's liability for the willful and malicious acts of his servants, the one without, and the other within, the liability. In the latter case, the defendant had a contract with Stranahan Company, the plaintiff, for the delivery of pure milk; the milk delivered was adulterated, and the plaintiff was thereby injured in its business. From the evidence it appeared that the adulteration had been caused by the wrongful act of the defendant's servant, delivering the milk, and that he adulterated the milk for the malicious purpose of injuring the business of his employer. It was claimed that this fact exonerated the employer; but it was held that the delivery of milk was in the course of his employment, and that his ill motive toward his employer did ⁴⁵⁸ not relieve the latter from his liability to the plaintiff. Bradbury, J., dissented; but there seems to be no real ground for the dissent. The case embodies a correct application of the principle of respondeat superior, as now interpreted, and as laid down in the earlier case of Passenger R. R. Co. v. Young, 21 Ohio St. 524, 8 Am. Rep. 78. It was a case where the plaintiff below and his wife were, by force, wrongfully excluded from a passenger-car; and it was argued that the master was not liable for such wrongful acts, unless shown to have been authorized by him, directly or by some general rule of the company. White J., after showing that the act was done in the course of the

conductor's employment, said: "When a person is injured by the act of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of the intention can be held to excuse the master."

The liability of the master for the acts of his servant is fully and accurately stated, conformably to the modern rule, in *Smith on Master and Servant*, 151: See, also, *Weed v. Panama R. R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Mott v. Ice Co.*, 73 N. Y. 543; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 486; *Marshall v. Stewart*, 33 Eng. L. & Eq. 7. It would seem from *Seymour v. Greenwood*, 7 Hurl. & N. 354, that the case of *McManus v. Crickett*, 1 East, 106, has been materially modified, and the law there brought more in harmony with the modern cases.

459 Applying the principles of the master's liability for the acts of his servant, as interpreted by the modern decisions, to the facts of the case as disclosed by the plaintiff's evidence, should the trial court have directed a verdict for the defendant? That it was a part of the janitor's employment to clean up the room, and that, to do so, it was necessary to move the tables from one part of the room to another, is not disputed. And it may be inferred from the evidence that a part of the work of moving the tables had been done; and that the completion of the work was delayed by the use made of one of the tables by the plaintiff in repairing the light; that the janitor became impatient, would wait no longer, and proceeded to move the table in a violent manner, regardless of the safety of the plaintiff, and he was thrown to the floor and injured. On the other hand, it is claimed that the janitor, by reason of his ill-will toward the plaintiff, was actuated wholly by malice, and violently shoved the table, not in performance of any duty within his employment, but with the willful purpose only of injuring the plaintiff. But it must be observed that this is the inference the defendant would have drawn from the evidence; but, certainly, an impartial mind may draw from it the former conclusion; and this shows that, from the same evidence, different minds may draw different conclusions—one favorable, and the other unfavorable—to the claim of the plaintiff; and hence the evidence should have been submitted to the jury under

proper instructions as to the law. This is the proper rule in determining whether a verdict should be directed in any case. The so-called "scintilla rule," frequently applied as a stigma to the practice that requires the case to be ⁴⁰⁰ submitted to the jury when there is any evidence to support the plaintiff's case, is better calculated to confuse than enlighten the mind.

In many cases it is clear from the nature of the act that it is not within the scope of the servant's employment. This is so in the Wetmore case. There the servant's duty was to check baggage; and when he made a violent assault on the plaintiff because he had provoked him, he turned aside and made an assault, not in the course of his employment, and for which the master was not liable. But when, as in this case, the act done—the pushing of the table—was, in its nature, within his employment, and the question is, whether it was in fact done in the performance of his service to his master, or was done wholly for the purpose of injuring the plaintiff and none other, it necessarily becomes, under our system of administering justice, a question to be determined by the trial of the fact: *Redding v. South Carolina R. R. Co.*, 3 S. C. 1, 16 Am. Rep. 681; *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274, 7 Am. Rep. 448; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129, 137, 21 Am. Rep. 597. In the latter case, which is one where a brakeman kicked a boy from a train while it was moving, it is said, by Andrews, J., delivering opinion: "Neither was the defendant entitled to have the court rule, as a matter of law, that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The brakeman, in kicking the boy from the platform, acted violently and unreasonably, ⁴⁰¹ and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the court could not say from the evidence that the brakeman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was willful within the rule which we have stated." The rule "stated" is substantially the same as that adopted, as the result of the modern decisions. After having so stated it, the learned judge says: "And when it is said that

the master is not liable for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders."

Affirmed.

Shauck and Spear, JJ., dissent from the judgment.

MASTER AND SERVANT—MASTER'S LIABILITY FOR MALICIOUS ACT OF SERVANT.—The old rule that the master was never liable for the willful or malicious act of his servant is not now the law. He is answerable, if the act was done in his master's business, and this is the true test of his liability: *Richberger v. American Exp. Co.*, 73 Miss. 161, 55 Am. St. Rep. 522; *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99; monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 85.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT—QUESTION FOR JURY.—Whether or not the act of a servant for which it is sought in a particular case to hold the master liable was done in the execution of the master's business within the scope of the employment is in most cases a question of fact: *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361, and note.

MASTER AND SERVANT—MOTIVE FOR ACT—QUESTION FOR JURY.—Whether a servant did a tortious act with a view to his master's service or to serve a purpose of his own is a question of fact for the jury: Monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 89; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 84, 2 Am. St. Rep. 312.

GRAND RAPIDS FIRE INSURANCE COMPANY v. FINN.

[60 OHIO STATE, 513.]

INSURANCE—PROVISIONS AS TO ARBITRATION.—Provisions in a policy of fire insurance that, in case of disagreement as to the amount of loss, it shall be ascertained by appraisers, and shall not become payable until sixty days after notice and satisfactory proof of loss have been given, including an award by appraisers, when an appraisal has been required, and that no action shall be sustainable on the policy until full compliance with all such conditions, do not make either an ascertainment of the loss by appraisers, or a demand by the insured therefor, a condition precedent to a right of action on the policy, nor do they impose any obligation on the insured to furnish an award of appraisers, except when demanded by the insurer.

INSURANCE — ARBITRATION — CONDITION PRECEDENT.—A condition in a policy of fire insurance, providing for an arbitration in case the parties cannot agree as to the amount of loss, cannot operate to deprive the assured of his right of action, unless clearly made a condition precedent to the existence of such right.

INSURANCE—PROVISIONS IN REGARD TO ARBITRATION.—Under provisions in a policy of fire insurance that, in case

of disagreement as to the amount of loss, it shall be ascertained by appraisers, the demand of the insurer for an appraisal must be made in good faith, within a reasonable time after proof of the loss has been furnished, and in such direct and explicit terms that a person of ordinary intelligence would fairly understand and be informed that the insurer requests a submission to appraisers for the ascertainment of the loss, and when it is claimed that the demand was made in writing, the instrument, if ambiguous, must be construed most strongly against the insurer.

INSURANCE—PROVISIONS IN REGARD TO ARBITRATION.—NOTICE to the insured to protect the property from further damage after the loss, and to preserve all that remains thereof until the loss has been determined in the manner stipulated for in the policy, and that the insurer would not pay any amount claimed until sixty days after the amount of loss or damage has been determined in the manner stipulated in such policy, does not constitute a demand for submission to appraisers for the ascertainment of the amount of the loss as provided for in the policy.

King, McVey & Robinson, for the plaintiff in error.

R. B. Murray and C. Koonce, Jr., for the defendant in error.

522 WILLIAMS, J. The effect of the charge for which the judgment of the trial court was reversed obviously was to preclude a recovery by the plaintiff, if the jury should find that she had failed to make demand for an ascertainment of the loss by an award of appraisers, and select a competent person to act as an appraiser, unless the defendant waived that mode of ascertainment, in some other way than by its failure to request an appraisal. **523** And that purport of the charge is defended by counsel for the plaintiff in error, on the ground that the policy sued on makes such demand by the plaintiff a condition precedent to the right to bring and maintain the suit. The stipulations of the policy to which that operation is ascribed are those contained in the statement of the case, and especially those which provide that "the loss shall not become payable until sixty days after notice, ascertainment, estimate, and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required"; and that no suit on the policy for any claim shall be sustainable "until after full compliance by the insured with all of the foregoing requirements." While the policy undoubtedly confers on either party the right to call for an ascertainment of the loss by appraisers, when the parties are unable to agree upon the amount, it does not itself constitute an arbitration bond, binding them unconditionally to a submission of the loss to the judgment of appraisers.

Whether that method of determining the loss shall be resorted to is optional with the parties, either of whom may, by demand on the other, require that it be pursued; and, when so required, no suit can be maintained until the award of the appraisers has been furnished. But the provisions of the policy in this respect do not execute themselves. The party who elects to invoke that mode of proceeding must notify the other, and request the selection of appraisers. Then, the agreement of submission follows. If neither party chooses to request the appraisal, the right of the other to pursue the ordinary legal remedies is unaffected. "A condition ⁵²⁴ in a policy of insurance providing for an arbitration in case the parties cannot agree as to the amount of loss cannot operate to deprive the assured of his right of action, unless clearly made a condition precedent to the existence of such right": *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 331, 9 Am. St. Rep. 598; *Sergeant v. Liverpool etc. Ins. Co.*, 155 N. Y. 349-355; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

It will be observed that this policy imposes no obligation on the assured to furnish an award of appraisers, except "when appraisal has been required." That requirement certainly should be made within a reasonable time after proof of loss; and, if not so made before suit, is no obstacle to the maintenance of the action. In other words, a demand by the insurer for an appraisal within a reasonable time after proof of the loss has been furnished, is, under such policy, a condition precedent to the right to require the insured to furnish an award of appraisers. This appears to be the construction placed upon such policies in numerous cases, and sustained by the great weight of authority. In *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, it was held that "provisions in a policy that an appraisal by arbitrators shall be made, if there is a disagreement as to the loss; that the loss shall not be payable until sixty days after notice and satisfactory proofs of loss have been given, including an award by appraisers when the appraisal shall be required; and that no action on the policy can be maintained without 'a full compliance by the insured with all the foregoing requirements'—do not make an appraisal a condition precedent to the right to sue, where the company makes no demand therefor." The same construction was placed upon like policies ⁵²⁵ in the following and other cases: *Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627; *National Home etc. Assn. v. Dwelling House Ins. Co.*, 106 Mich. 236;

Davis v. Atlas Assur. Co., 16 Wash. 232. In Sun Ins. Co. v. Crist (Ky., March 20, 1897), 39 S. W. Rep. 837, the court held that: "The insured need not plead or prove performance of the provision for arbitration in a fire policy, it being the duty of the company to propose arbitration in case of disagreement."

The charge of the trial court was in conflict with the established construction of policies like that involved in this case, and was, we think, erroneous.

It is contended, however, that the error in the charge was not prejudicial to the plaintiff, because the notice of January 3, 1896, and letter of February 21, 1896, set out in the statement of the case, contain a demand by the defendant for an appraisal of the plaintiff's loss, substantially in accordance with the policy. It is not claimed that either of those documents contains such a demand in terms, but only that one may be inferred therefrom. To be of any avail, the demand must be made in good faith, within a reasonable time after proof of the loss has been furnished, and in such direct and explicit terms that a person of ordinary intelligence would fairly understand and be informed that the insurer requests a submission to appraisers for the ascertainment of the loss; and, when it is claimed the demand was made in writing, the instrument, if ambiguous, will be construed most strongly against the insurer, for the reason that the company has the opportunity of making its meaning clear and unequivocal. The only language in either of the documents referred to which counsel claim to be equivalent to a demand for an appraisal is that ⁵²⁶ contained in the first one, by which the insured is directed to protect the property from further damage, and preserve all that remains, "until the loss thereon has been determined in the manner stipulated for in said policy"; and that of the other, in which she was informed that the company would not pay any amount claimed until "sixty days after the amount of the loss or damage has been determined in the manner stipulated in said policy." It seems evident that neither of these statements amounts, by any proper construction, to a present demand for an appraisal of the plaintiff's loss; nor can such demand be fairly extracted from either or both of the instruments as a whole. By the first one the adjuster simply gave directions to the insured for the care of the property, and for an inventory required preliminary to an adjustment; and the other is wholly made up of objections to the proof of loss furnished, coupled with the information that the loss would not be paid "before

the expiration of sixty days after it should be determined"; but there is no request to have the loss determined by appraisers. We therefore concur in the holding of the circuit court that neither of the documents mentioned constituted a demand for an appraisal, and the error in the charge was prejudicial.

Judgment affirmed.

INSURANCE—ARBITRATION—CONDITION PRECEDENT.—A mere provision in a policy of insurance that, in the event of a disagreement as to the amount of the loss, it shall be ascertained by arbitrators, does not make arbitration a condition precedent to the right to recover on the policy: *Read v. State Ins. Co.*, 103 Iowa. 307, 64 Am. St. Rep. 180. A condition in a policy of insurance providing for arbitration cannot deprive the insured of his right of action, unless clearly made a condition precedent to the existence of such right: *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598.

INSURANCE—PROVISIONS AS TO ARBITRATION.—Where a policy of insurance provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void, since its effect is to oust the courts of their legitimate jurisdiction, which the parties cannot do. On the other hand, parties may lawfully agree to impose a condition precedent with respect to the mode of settling the amount of damage, or the time for payment, or any matters of that kind which do not go to the root of the action: *Extended notes to Utter v. Travelers' Ins. Co.*, 8 Am. St. Rep. 922; *Commercial Union Assur. Co. v. Hocking*, 2 Am. St. Rep. 566. When a provision relating to arbitration is not a condition precedent to suit on the policy: See *Aetna Ins. Co. v. McLead*, 57 Kan. 95, 57 Am. St. Rep. 320, and note.

BRADFORD GLYCERINE COMPANY v. ST. MARYS WOOLEN MANUFACTURING COMPANY.

[60 OHIO STATE, 560.]

EXPLOSIVES—LIABILITY FOR STORING AND KEEPING.—One who stores nitroglycerine or other high explosive on his premises is liable in damages for injuries caused to surrounding persons or property by its explosion, although he is not chargeable with either want of care or an unlawful act in connection with the storage or casualty.

EXPLOSIVES—STORING AND KEEPING—LIABILITY FOR EXPLOSION.—One who stores or keeps nitroglycerine or other high explosive on his premises is liable for all injury to surrounding property caused by its explosion, and such liability extends to all property within the circle of danger, whether adjacent to the premises on which the explosive is stored or not.

G. H. Phelps, for the plaintiff in error.

Culliton & Smith and J. H. Goeke, for the defendant in error.

565 BRADBURY, C. J. The cause was submitted to the court of common pleas on the following agreed statement of facts:

"It is hereby stipulated that this case will be submitted to the court upon the following statement of facts as the evidence in this case:

"Plaintiff is a corporation organized under the laws of Ohio, and the owner of real estate whereon buildings are erected in the village of St. Marys, Auglaize county, Ohio, and was such at all times stated in the petition filed in this action.

"The defendant is a partnership organized for the purpose of doing business in the state of Ohio and owning property therein.

"On or about January 25, A. D. 1896, the defendant was the owner of a magazine and contents containing **500** about fifty quarts of nitroglycerine used by the defendant in its business of manufacturing, storing, and vending nitroglycerine, which magazine was situated on a tract of land belonging to one W. G. Kishler, and situated something over a mile west of the buildings so owned by the plaintiff in St. Marys, Ohio, and situated about one-fourth ($\frac{1}{4}$) of a mile distant from the corporation line of the village of St. Marys, Auglaize county, Ohio.

"That on or about said twenty-fifth day of January, A. D. 1896, while one of the defendant's servants was upon the premises upon which said magazine was located engaged in transferring about seven hundred and fifty (750) quarts of nitroglycerine from a wagon loaded with same to said magazine, the said nitroglycerine stored therein, and also the same upon the wagon aforesaid, from some cause unknown to said defendant, exploded with great force and concussion, causing vibrations in the atmosphere sufficient in power and violence to break, shatter and destroy three (3) plate glass and three (3) common glass in the buildings owned by the plaintiffs aforesaid of the value of two hundred and forty-four dollars and ten cents (\$244.10), by reason of which explosion and the breakage of said glass the plaintiffs were injured and damaged to the extent aforesaid.

"That nitroglycerine is a dangerous substance and likely to explode. That demand of payment of said sum has been made by the plaintiff to the defendant, and payment thereof has been refused."

This agreed statement of facts does not show that the plaintiff in error violated any statute of the state or was in any degree negligent in handling or storing the explosive substance involved. It was nitroglycerine, a well-known and highly ⁵⁶⁷ explosive agency, which the agreed statement of facts shows "is a dangerous substance and likely to explode." Is one who brings upon his own premises such agency liable for damages caused by its exploding, although such owner is not chargeable with either want of care or an unlawful act in connection with the casualty? This exact question has not heretofore been considered by this court, although a number of cases have been decided by the court that bear a general resemblance to it: *Gas Fuel Co. v. Andrews*, 50 Ohio St. 695; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532; *Tiffin v. McCormick*, 34 Ohio St. 638, 32 Am. Rep. 408. The tendency of these cases is toward holding the parties charged with the management of dangerous substances to a strict liability. In *Tiffin v. McCormick*, 34 Ohio St. 638, 32 Am. Rep. 408, this court held: "Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining landowner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked." And the same view of the liability of one who, by blasting rocks, cast fragments thereof against the house of another, was taken by the court of appeals of New York in the cases of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, and *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284. The court in the first case decided that: "The defendants, a corporation, dug a canal upon their own land for the purposes authorized by their charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. Held, that the defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved." And ⁵⁶⁸ in the second case that: "The defendants dug a canal upon their own land, and, in executing the work, blasted the rocks so as to cast the fragments against the plaintiff's house on contiguous lands. Held, in an action on the case brought to recover damages for the injury, that evidence to show the work done in the most careful manner was inadmissible, there being no claim to recover exemplary damages, and the jury having been instructed on the trial to render their verdict for actual damages only."

Counsel for plaintiff in error contend that in respect of the matter under consideration, the analogy between the act of blasting rock on one's premises and storing a dangerous explosive thereon is not close. In the one case, the damage is caused by fragments of rock being hurled upon or against the property injured, while in the other case the damage is caused by violent atmospheric vibrations from the explosion. If, however, the explosion caused fragments of the building wherein the explosive material was stored, or other solid substance, to be thrown against the property injured, thereby producing damage, the analogy might be more easily perceived. True, it might be said that in the one case the party to be charged was actively engaged in the work that caused the injury, while in the other case he was simply using the premises to store the dangerous substance, not intending that it should explode. These distinctions, however, do not seem to be material. The right of the owner of a stone quarry to blast rock therefrom, where that is necessary to a profitable use of his property, or the right of one to make an excavation of any kind on his own property, where blasting is a proper and usual mode to ⁵⁶⁹ accomplish the owner's purpose, would seem to be of as high and perfect a character as is the right of an owner to use his premises as a storehouse for explosive substances. Upon what principle should an owner of property hold it subject to the right of another to store on his own premises adjacent to it nitroglycerine, but not subject to the right of that other to blast rock? If one may store nitroglycerine on his own premises, and not be liable to adjacent property for damages caused by its exploding unless he has been negligent, while in the case of the owner of the quarry the latter is liable for an injury to an adjacent property resulting from blasting, although free from negligence, then it is plain that the adjacent proprietor holds his property in the one case subject to the right of his neighbor to store a dangerous explosive, but not to the right of his neighbor to blast rock. In the first supposed case, the liability grows, not out of the storing of the dangerous explosive, but out of the negligence of the person storing it, while in the last supposed case the liability springs from the manner in which the property is used, i. e., the blasting, and negligence need not be shown. If, in the latter instance, the party blasting is liable for injuries that resulted from his act, however careful he may have been, the reasons for absolving the former

from liability, unless he has been negligent, are not apparent. The blasting doubtless is a menace to adjacent property, but so is the storing of a highly explosive substance.

In this case, the premises on which the explosive substance was stored and the premises on which the building stood that was injured do not appear to have been adjacent. They were a mile apart, and, for anything that appears in the record, many ⁵⁷⁰ parcels of real estate owned by third persons may have intervened. That, however, does not seem to be material either. One who, in blasting rock, should cast fragments across a strip of adjacent land owned by a third person against the windows of a more remote proprietor would hardly be heard to say in defense of his act that the property injured was not adjacent. Whatever duty he owed to his neighbor extended equally to all who might fall within the lines of danger. So it would seem that, in the case of explosives, the right of all within the circle of danger should be equal, irrespective of whether the property injured was adjacent to the premises upon which the material was stored.

The liability of one who, for his own purpose, brings upon his own premises substances dangerous to others, if not kept under control, was exhaustively discussed by the judges of England in the case of *Fletcher v. Rylands*, L. R. 1 Ex. 265, and afterward on a review of the case in the house of lords, L. R. 3 H. L. 330.

In the exchequer chamber, Justice Blackburn, in giving judgment, employed the following language: "We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle ⁵⁷¹ just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his

neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if he gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And, upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.

This language was approved in the house of lords when the cause came up for consideration there, Lord Cranworth saying: "My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the exchequer chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

⁵⁷² The doctrine in this case (*Rylands v. Fletcher*, L. R. 1 Ex. 265) has not been accepted by some of the courts of this country: *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; but has been approved in *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Mears v. Dole*, 135 Mass. 510; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184.

In the case above cited from New York (*Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623), and that from New Jersey (*Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394), a casualty occurred from an explosion of steam boilers.

To my mind, the analogy between the act of storing so highly explosive and dangerous an agency as nitroglycerine on one's premises, and that of conducting a business thereon, which requires for its successful operation the use of steam,

is not complete, although each is an explosive. Doubtless, both are dangerous agencies when control over them is lost. The use of steam has, however, so generally been employed in every productive industry that every owner of real property may reasonably be held to contemplate the contingency of its being employed upon adjacent premises, and to enjoy his property subject to that risk. In a great city like New York or Chicago, where numerous and varied industries are conducted, there are doubtless many thousands of places where steam is employed. The entire population of such a city is interested, and most of them directly or indirectly benefited by these industries. Large numbers of them labor by day in factories where steam furnishes the motive power, and many of them sleep at night in buildings containing ⁵⁷³ engines in active operation. The modern steam boiler and engine cannot be said to be such a menace to property and human life as to constitute a nuisance *per se*. They cannot, as such, be driven from the centers of population. Not so, however, with gunpowder and nitroglycerine. These latter agencies, on account of their dangerous character, may be, and usually, if not universally, are, driven into the suburbs of towns and cities, remote from human habitations and valuable structures. Under the circumstances that surround the productive arts and industries of today, a modification of the strict rule of liability in favor of those who employ steam in such arts or industries may not be inconsistent with its assertion against those who store gunpowder and nitroglycerine, or blast rocks adjacent to the property of others. That public policy which seeks to secure the welfare of the many may demand such modification.

Whether upon such grounds or for any other reasons, such a modification of the rule should obtain in the case for the use of steam is not, of course, before the court, and the question is only considered in this brief way to show that there may be no irreconcilable conflict between the cases that have absolved the owners of boilers from liability for the consequences of an explosion occurring without their fault, and the conclusions reached by us in the case under consideration. Doubtless gunpowder, nitroglycerine, and other dangerous explosives are useful agencies in many industries, as well as steam, but, conceding that in the case of steam boilers, the extensive and varied uses to which steam is devoted, the comparatively slight danger arising from its use, require on ⁵⁷⁴ principles of public policy,

which regards the interests of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor to erect a manufactory and employ steam on adjacent premises, yet it does not necessarily follow that such owner should possess his property also subject to the right of his neighbor to erect a powder or nitroglycerine magazine in his vicinity.

The existence of a manufacturing establishment, although it employ steam as a motive power, may, and doubtless is, in many instances, a positive benefit to real property in its vicinity, and, instead of diminishing, may enhance its value, while, on the contrary, the erection and use of a nitroglycerine magazine could have no other than a disastrous effect on the value of all real property in its vicinity. We think, therefore, the right to maintain the former may be placed upon grounds that cannot apply to the latter. The general doctrine upon the subject stated in *Fletcher v. Rylands*, L. R. 1 Ex. 265, seems to be just and fair in its general operation. The syllabus of that case, as announced by the house of lords, L. R. 3 H. L. 330, seems to recognize a distinction in this respect between an ordinary and an extraordinary use of his premises by their owner, and had that learned tribunal then had before it a case where damages were sought on account of injuries resulting from an explosion of a steam boiler in a manufacturing establishment, it might have denied the liability in the absence of proof of negligence, on the ground that the owner was using his premises in an ordinary manner.

But whatever might have been done by the house of lords in the case supposed, we are of the ⁵⁷⁵ opinion that the storing of nitroglycerine should be deemed to be an extraordinary and unusual use of property, and we can see no principle upon which an exception to the general doctrine laid down in *Fletcher v. Rylands*, L. R. 1 Ex. 265, can be held to exist in favor of one who stores upon his own premises that or any other dangerous explosive.

Judgment affirmed.

Shauck, J., dissents.

EXPLOSIVES—LIABILITY FOR KEEPING.—A number of the cases maintain that the true and only ground of liability for damages arising from the keeping explosives, and caused by an explosion happening while the party sought to be charged is in the lawful possession of the thing exploding, is the want of ordinary care or skill in its management, or in the manner in which it is kept.

The true rule, however, we think is, that if the manufacture or storage of explosives is such as to amount to a nuisance, either public or private, the party so manufacturing or storing the articles in question is liable for all damages occasioned thereby, or through an explosion thereof, even though he may not have been guilty of negligence, and regardless of the care exercised in storing the explosives, or in choosing the place in which they are kept: Monographic note to *Kinney v. Koopman*, 67 Am. St. Rep. 134-140.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ESTATE OF COPE.

[191 PENNSYLVANIA STATE, 1.]

TAXATION OF INHERITANCES.—An act entitled “An act taxing gifts, legacies, and inheritances in certain cases, and providing for the collection thereof,” and providing for the taxation of inheritances of personal property, is essentially and avowedly a tax law imposing a state tax on certain specified personal property, and has none of the features of an intestate law, or of an act regulating the disposition of property by will, or by instruments in the nature thereof.

TAXATION OF INHERITANCES — CONSTITUTIONAL LAW.—A statute imposing a tax on gifts, legacies, and inheritances in certain cases, and providing for the collection thereof, but exempting from its operation personal property in all estates to the amount of five thousand dollars, is void, as in violation of a constitutional provision that all taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and that all laws exempting property from taxation, other than certain enumerated property, are void, when inheritances are not among such enumerated exemptions.

TAXATION—UNEQUAL CLASSIFICATION—CONSTITUTIONAL LAW.—A pretended classification of property for the purposes of taxation that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, illegal, and unconstitutional.

TAXATION OF INHERITANCE—LOCAL LAWS—CONSTITUTIONAL LAW.—A statute imposing a tax on gifts, legacies, and inheritances in certain cases only is necessarily a special law and in conflict with a constitutional provision prohibiting the passage of any local or special law changing the law of descent or succession.

F. A. Osbourn, J. P. Elkin, J. C. Grady, and H. C. McCormick, attorney general, for the appellant.

C. E. Morgan, Jr., and R. C. Dale, for the appellees.

17 STERRETT, C. J. This appeal challenges the validity of the decree of the court below, in which the act of May 12, 1897 (Pub. Laws, 56), entitled, "An act taxing gifts, legacies, and inheritances in certain cases and providing for the collection thereof," was adjudged unconstitutional and void.

Section 1 of the act declares: "That from and after the passage of this act, all personal property, of whatsoever kind and nature, which shall pass by will, or by the intestate law of this state, from any person who may be seised or possessed of the same . . . shall be, and the same is hereby made subject to a tax of two dollars on every one hundred dollars of the clear value of such personal property, after deducting the debts of the decedent and costs of administration, . . . to be paid for the use of the commonwealth; and all heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes . . . by paying the same for the use aforesaid, as hereinafter directed; provided, that personal property to the amount of five thousand dollars shall be exempt from the payment of this tax in all estates; and provided further, that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this act shall be liable to the tax imposed by this law, as well as the estates of persons who die hereafter."

The last quoted proviso appears to have been added by way of amendment to the first section of the bill while it was under consideration, with the view of so enlarging (by improper use of a proviso) the scope of that section as to bring within its operation undistributed portions of all estates of persons theretofore deceased. Inasmuch as the testator, in the case now under consideration, died September 5, 1897—nearly five months after the passage of the act above cited—the retroactive provision of said proviso is not involved and requires no further notice in this case. In other cases, however, which have been argued, the commonwealth's claims are based upon the retroactive operation of said proviso. In disposing of them, it may not be amiss to consider the retroactive effect of the proviso.

The manifest effect of the first above-quoted proviso is to ¹⁸ effectually exclude from the operation of the taxing provisions of the act "personal property to the amount of five thousand dollars . . . in all estates." To that extent, the operation of the act is restricted and qualified.

It is further restricted and qualified by section 16, which

provides: "This act shall be known as the direct inheritance tax law, and shall not be held to change, modify, or alter the existing law in reference to the collection of collateral inheritance taxes, it being the intention of this act to impose a direct inheritance tax on all estates or parts of estates not subject to the act or acts providing for the collection of collateral inheritance taxes."

The intervening sections, 2 to 15, inclusive, are devoted to what may be called the administrative provisions of the act. The second declares: "If the said tax shall be paid within three months after the death of the decedent, a discount of five per cent shall be made and allowed, and if the said tax is not paid at the end of one year from the death of the decedent, interest at the rate of six per centum per annum shall be charged for such year, and after the expiration of one year from the death of the decedent, interest shall be charged at the rate of twelve per centum per annum on such tax," et cetera.

The proviso to section 5 declares: "That all taxes imposed by this act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of such property from the time the said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the commonwealth."

As defined and limited by the act itself, the tax sought to be charged and collected under its provisions is imposed, in express terms, on "all personal property of whatsoever kind and nature which shall (thereafter) pass by will, or by the intestate laws of this state," from the respective owners thereof upon their decease, and upon all property, of the same kind which had theretofore passed, in the same manner, from the owners thereof and was not "actually distributed and paid to the persons entitled thereto prior to the passage of this act"; but exempting, however, from said tax "in all estates," personal property to the amount of five thousand dollars, and excepting from the operation of the act all personal property that is "subject to the act ¹⁰ or acts providing for the collection of collateral inheritance taxes."

As already stated, Marmaduke C. Cope, the testator in this case, died nearly five months after the passage of the act, and in due course his executor's account was filed and confirmed, showing nine hundred and seventeen thousand five hundred and nineteen dollars and eighty-eight cents, net balance of personal property for distribution. The learned auditing judge of

the court below rejected the commonwealth's claim on the fund for state tax, under the provisions of the so-called "direct inheritance tax law" in question, on the ground that in *Blight's Estate*, 6 Dist. Rep. 459, *Portuondo's Estate*, 6 Dist. Rep. 462, and other cases involving the same question, the said court had theretofore declared the said law unconstitutional and void. Exceptions to said adjudication having been filed by the commonwealth, the same were duly considered and dismissed by the court in bank which, in an opinion by its learned president, confirmed the adjudication and decreed distribution accordingly. Hence this appeal by the commonwealth.

Substantially, the only question involved in the five specifications of error is this: Did the learned court below err in deciding that the act in question is unconstitutional? In our opinion it did not.

As to the character of the act, there cannot be any doubt. That it is an act imposing taxes on the personal property therein specified is too plain for discussion. To hold otherwise would be a perversion of the plain meaning of the words employed in entitling the act and specifying its provisions. As we have seen, its title declares it to be, "An act taxing gifts, legacies," et cetera, and providing for the collection thereof. Section 16 declares that it shall be "known as the direct inheritance tax law." The "personal property" specified in the act is, in express terms, "made subject to the tax," et cetera: Act of May 12, 1897, sec. 1. The second proviso to that section expressly declares "that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this act shall be liable to the tax imposed by this law, as well as the estates of persons who die hereafter." Section 5 declares: "All taxes imposed by this act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of ²⁰ such property," et cetera. It is also an act exempting "from the payment of this tax, in all estates," personal property specified therein to the amount of five thousand dollars.

The act in question has none of the features of an intestate law, or of an act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a will's act, under the

operation of one or other of which the personal property intended by its provisions to be subjected to taxation would pass from the then, as well as subsequent, owners thereof to others, or had theretofore passed and become vested in others prior to the date of the act under consideration.

Having thus seen that the act in question is essentially and avowedly a "tax law," imposing a state tax on certain specified personal property, and providing for the collection thereof, let us briefly inquire whether it offends against the fundamental principles of taxation, or the provisions of our constitution relating thereto. If it does, our manifest duty is to support and defend the latter by declaring the act unconstitutional: *Perkins v. Philadelphia*, 156 Pa. St. 554. In that case it was well said, *inter alia*, by our brother Dean: "Every department of the government is bound by its [the constitution's] provisions, but especially is this court, for on it is the duty of judicially determining any violation of it."

It is of the very essence of taxation that it should be relatively equal and uniform, and where the burden is common there should be a common contribution to discharge it: *Cooley's Constitutional Limitations*, *495. In his *Treatise on Taxation*, second edition, pages 2, 3, the same learned author says: "In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially."

"Equality in the imposition of the burden is of the very essence ²¹ of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable. Equality as far as practicable, and security of property against irresponsible power are principles which underlie the power of taxation as declared ends and principles of fundamental laws": *Desty on Taxation*, 29, and cases there cited.

As was well said by Mr. Justice Brewer in his dissenting opinion in *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, 301: "Equality in right, in protection, and in burden is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independ-

ence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality: *Merchants' etc. Bank v. Pennsylvania*, 167 U. S. 461. But where a tax law directly, necessarily, and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality, thus intentionally created, can find any constitutional justification."

Further citation of authorities in support of these fundamental principles is unnecessary. In nearly every state in the Union they are more or less carefully guarded against specific transgressions by constitutional restrictions and limitations.

Our constitution, article 9, sections 1 and 2, declares: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax; but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity. All laws exempting property from taxation, other than the property above enumerated, shall be void."

The language of section 1, as to what the rule of uniformity shall embrace, is as broad and comprehensive as it could possibly have been made. The words, "all taxes," must necessarily be construed to include property tax, inheritance tax, succession tax, and all other kinds of tax the subjects of which are susceptible of just and proper classification. By necessary implication, the first clause of that section recognizes the authority of the ²² legislature to justly and fairly, but never arbitrarily, classify those subjects of taxation with the view of effecting relative equality of burdens. A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes, with the view of imposing a different tax rate on each—class 1, consisting of personal property exceeding in value the sum of one hundred thousand dollars; class 2, consisting of personal property exceeding in value twenty thousand dollars, and not exceeding one hundred thousand dollars; and class 3, consisting of personal property not exceeding in value twenty thousand dollars—would be so manifestly arbitrary and illegal that no one would attempt to justify it.

The next clause of section 1 expressly authorizes the legis-

lature to exempt from taxation four specified classes or kinds of property. This specific delegation of authority to exempt impliedly prohibits express exemption from taxation of any other property, but, to place this matter beyond the reach of doubt, it is expressly ordained in section 2 that "all laws exempting property from taxation other than the property above enumerated shall be void."

These limitations on the power of the legislature mean something. They are plainly intended to secure, as far as possible, uniformity and relative equality of taxation, by prohibiting generally the exemption of a certain part of any recognized class of property, and subjecting the residue to a tax that should be borne uniformly by the entire class, and by guarding against any other device that necessarily or intentionally infringes on the established rules of uniformity and relative equality which, as we have seen, underlie every just system of taxation. In any view that can reasonably be taken of these limitations, it must be manifest to any reflecting mind that the act in question offends against them by undertaking to wholly exempt from taxation the personal property of a very large percentage of decedent's estates, and impose increased and unequal burdens on the residue of the same class of property.

If the authority to exempt, et cetera, which was assumed and exercised by the legislature in this case, is sanctioned by this ²³ court, the constitutional rule of uniformity virtually becomes a dead letter, and, in lieu of the will of the people, as plainly declared in the fundamental law of the state, the unrestrained will of the legislature becomes the supreme law on that subject. If the legislature had authority under the constitution to do what was done in this case, they had like authority to reverse their order of taxation, et cetera, and thus impose the tax on personal property amounting in value to five thousand dollars and less, and exempt therefrom all property of same recognized class in excess of that sum; and, consequently, they have like authority, in every case, to establish any other arbitrary ratio between the amount in value of property to be taxed and that which shall be exempt therefrom, in any class of subjects.

The commonwealth's contention is that the "two dollars on every one hundred dollars of the clear value of such personal property" in excess of five thousand dollars is not a tax according to the true intent and meaning of article 9, sections 1 and 2 of the constitution above quoted; that independently of the

taxing power, the legislature was fully empowered to pass the act in question, and hence it is not within the inhibition of section 9 of the constitution; that in the language of Dos Passos on Inheritance Tax, second edition, chapter 2, section 8: "Such taxes are nothing more than a burden, bonus, excise, or assessment, as they have been variously defined, imposed by the government upon the passing, devolution, transmission, or privilege of taking or receiving property under wills and intestate laws, whether such property passes to collateral or lineal heirs."

These propositions are predicated of the assumed principle that the right to inherit or succeed to property is not a natural but merely a civil right (1 Sharswood's Blackstone, 398, 399), and hence the commonwealth, acting through its law-making power, may assert its sovereign right to take and appropriate to its own use such portion or portions of the estates—real, personal, and mixed—of every decedent as the legislature, in its wisdom, may consider necessary and proper. They also assume that the people of this state, in their fundamental law, have placed no restriction on legislative power in that regard.

Without pausing to consider the soundness as well as the scope of the principle thus broadly asserted, but conceding, for argument's sake merely, that the legislature has the power under ²⁴ our constitution to so change the law of descent and succession as to give the commonwealth a certain portion of every decedent's estate, or to otherwise regulate the transmission or devolution of such estates, it does not by any means follow that the "direct inheritance tax law" under consideration is such an act. As we have seen, the act does not profess to be a supplement to or an amendment of our laws relating to the estates of testates or intestates, but quite the reverse. There is nothing in its title or its text to indicate anything else than that it was intended to be a tax law imposing a tax of two per centum on the personal property of decedents therein specified within the scope of article 9 of the constitution; but assuming, for argument's sake only, that it is otherwise—that it was in fact intended to be an act supplementary or amendatory of existing laws regulating the succession to estates of decedents—we think it clearly offends against that clause of article 3, section 7, of the constitution which declares: "The general assembly shall not pass any local or special law . . . changing the law of descent or succession."

As our laws of descent and succession stood prior to the passage of the "direct inheritance tax law," the personal property specified in said act was never subject to any "burden, bonus,

excise, or assessment" whatever. The pre-existing law of succession is changed by that act, in that it imposes a burden on so much of said property as is in excess of five thousand dollars, and leaves it unchanged as to the residue. It is, therefore, a special and not a general act, because it does thus impose a burden on a part of said property, and declares that, in all estates, personal property, not exceeding five thousand dollars in value, shall be exempt from said burden. It thus changes the law of succession as to part of the property specified therein, and attaches a condition to the right of succession which is neither general nor uniform, in that the burden is not imposed upon all distributees or all estates of decedents, but only upon a portion of them arbitrarily selected, while others in precisely the same class are exempted therefrom. As to classification, it is very clear that five thousand dollars in value of the personal property specified in the act is precisely the same in kind as fifty thousand dollars (or any other sum) in value of said property. The money value of any given kind of property, such as that specified in the act can never be made a legal basis of subdivision ²⁵ or classification for the purpose of imposing unequal burdens on either of such classes, or wholly exempting either of them from any burden. On the commonwealth's own assumption, therefore, the act is a special law, changing the law of succession, and is clearly forbidden by article 3, section 7, of the constitution.

In the absence of reliable data, the practical operation of the five thousand dollar exemption proviso cannot be definitely stated, but it would, perhaps, be safe to say that, outside of the large centers of population, from ninety to ninety-five per cent of the estates of decedents, administered by the orphans' court from year to year, do not separately represent personal property exceeding in value the sum of five thousand dollars; so that probably not more than from five to ten per cent of said estates, therein administered, are subject to the two per cent direct inheritance tax. Whatever the percentage of such estates may be—whether more or less than five to ten per centum—it conclusively shows the special character of the act in question. It also illustrates the injustice and inequality that must result from such special legislation. If the exempted personal property were subjected to the same tax rate that is required to be paid on personal property in excess of five thousand dollars, it would yield to the commonwealth an average of about fifty dollars on each decedent's estate—a sum that is by

no means insignificant when the aggregate number of such estates is taken into consideration.

Appellant's suggestion, that we have a precedent for exemption in the proviso to our collateral inheritance tax law, has no force when we recall the fact that said proviso was enacted in 1826 (Pub. Laws, 227), long before the adoption of our present constitution containing the limitations on the powers of the legislature, which we have been considering. No such limitations existed in 1826 when the proviso to our collateral inheritance tax law was enacted, and, of course, it was a valid enactment which has never been repealed or modified.

There are other points of minor importance to which reference might be made, but enough has been said to show that in any view that can be reasonably taken of the act in question it is unconstitutional and void.

Decree affirmed and appeal dismissed at appellant's costs.

TAXATION OF INHERITANCES—UNIFORMITY.—A succession tax must be uniform as to persons of the same class. One person cannot be charged a greater percentage on his legacy than another person in the same class, because the amount of his legacy is greater than that of the latter. A statute imposing a charge of five per cent for legacies of ten thousand dollars, and, where legacies are above that sum, five per cent on the first ten thousand dollars, and twelve and a half per cent on the balance, is therefore void for want of uniformity: *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653. But see *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367.

TAXATION OF INHERITANCES—CONSTITUTIONALITY OF: See, generally, on the question of taxation of inheritances, the monographic notes to *State v. Hamlin*, 41 Am. St. Rep. 580; *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 508.

KEATOR v. SCRANTON TRACTION COMPANY.

[191 PENNSYLVANIA STATE, 102.]

CARRIERS — PASSENGERS — TRANSFERS — NEGLIGENCE.—If a passenger is given a transfer ticket from one electric-car to another to enable him to reach his destination, and, while in the highway approaching and near to the proper car for him to take under the terms of the transfer, he is struck by a piece of the trolley pole, which breaks while it is being turned from one end of the car to the other, and while the company or its servant is not exercising extraordinary care toward the holder of the transfer, he is entitled, as a passenger, to recover for the injury thus sustained.

E. Warren, E. N. Willard and H. A. Knapp, for the appellant.

S. B. Price, for the appellees.

¹⁰⁹ DEAN, J. Appellant operates two lines of electric passenger cars running out from the city of Scranton, one north, the other south; ¹¹⁰ the terminus of the one running north was at the corner of Penn and Lackawanna avenues; of that running south, in front of the Wyoming House, a block distant, the company provided a continuous passage on both lines by transfer tickets. On August 30, 1894, Susan Keator, plaintiff, got upon a car of the north line to go to Mountain Lake, a pleasure resort on the south line. She paid her fare, and, when the car stopped at the corner of Penn and Lackawanna avenues, got off; before she left the car the conductor gave her a transfer ticket which read: "Good upon next south side car within thirty minutes from nine o'clock." She then walked to the starting point of the south side car in front of the Wyoming House. While standing on the pavement, the trolley-car pulled up and stopped; as it would proceed to its destination in an opposite direction, the motorman attempted to change the trolley-pole to the other end of the car; in doing so it broke, and a piece of it struck Mrs. Keator on the head and shoulder, inflicting a severe injury; when stricken, she had moved from the pavement to a point midway between the curb and car; the distance from car to curb was about ten feet; at the time, the seats had been reversed in the car, which was an open one, and she was approaching it to get on. On the trial in the court below, two questions arose, one of law for the court, and one of fact for the jury. On the undisputed facts, was plaintiff, at the time of the injury, in a legal sense, a passenger on defendant's road? If so, then she was entitled to recover, for defendant adduced no evidence of that high degree of care, such as is incumbent on a common carrier of passengers, when one has been injured by any of the machinery or attachments of the car or other vehicle in which the passenger is being transported. If she was not a passenger, then did the company exercise that ordinary care in manipulating its machinery which it owed to others occupying and using a common highway? The court decided the first question in favor of plaintiff, but to save a second trial, if such ruling should be error, it submitted the evidence bearing on the second question to the jury, directing them to make a special finding as to that branch of the case. On this question, the jury answered, that defendant had not exercised ordinary care in changing the trolley, consequently

there was a finding for plaintiff on both grounds; her damages were assessed at four thousand six hundred and seventy dollars and eighty-three cents. Afterward ¹¹¹ in a very full opinion filed, the court overruled a motion for a new trial, and entered judgment on the verdict.

The case turns here, on whether the court below was correct in holding, on the undisputed facts, that plaintiff, at the time she received the injury, was a passenger. We think grave injustice might have been done defendant by the method of trial, if its liability had depended on the answer of the jury to the second question. The court pointedly decided and explicitly announced, as matter of law, that defendant owed to plaintiff, as a passenger, extraordinary care, and then submitted to them the evidence, to determine whether it had exercised toward her, as a traveler on the highway, ordinary care. A jury of lawyers would doubtless have clearly perceived the distinction so perspicuously pointed out by the court; but with the large majority of laymen, it would not be comprehended, and, if comprehended, would, in many cases, not be heeded. In considering the second question, the jury would start with the conviction that defendant had violated its lawful duty to its own passenger, and probably, therefore, had neglected a less rigorous one to the general public. In the face of the law, as declared by the court on the first question, a corporation's chance for a favorable verdict on the second was a very remote one with the ordinary jury. We would hesitate to sustain the court's method of reaching a verdict, however commendable the motive, if the correctness of the judgment depended on the jury's answer to the second question; defendant was entitled in fairness to an answer on the second from a jury, unprejudiced by a decision against it on the first.

But, taking the undisputed facts, was the plaintiff's relation to defendant at the time of the injury that of a passenger? If so, then the burden was on defendant to show it had exercised a high degree of care toward her because of that relation. It offered no evidence as to the strength of the trolley-pole; whether it had been subject to inspection at any time; whether age and constant use had destroyed the tenacity of its fiber; or even whether it was ever safe for its purpose. The fact stood out undisputed, that in manipulating the pole in the usual way, it broke and injured plaintiff. Unquestionably, defendant failed in its duty to her, if she was a passenger. It must be conceded, we think, that the transfer ticket, on its face, was an

undertaking to carry her from the point where the car started, in front ¹¹² of the Wyoming House, to her destination on the south side line. She was not a passenger while on the sidewalk going from one point to the other. Thus far, the construction of the carrier's contract, from the undisputed circumstances and the ticket, is palpable. When did the obligation of the contract end with regard to her at this interval? It must be borne in mind, as so clearly pointed out by the learned judge of the court below, that the injury to her was from a defect in an indispensable attachment of the very vehicle in which defendant had undertaken to carry her. It was not a sidetracked car, or an unused one, which she had no right to get on, but, in the common phrase, it was "her car," that had been provided by defendant to carry her to her destination, which caused the injury. There is no definition of the duty of defendant to plaintiff which fits the facts of this case. That cited and relied on by appellant—1 Fetter on Carriers of Passengers, section 233—applies to a different state of facts. The author says: "When he (a passenger) steps from the street-car to the street, he ceases to be a passenger when he alights. The street is in no sense a passenger station for the safety of which the street railway is responsible. When a passenger steps from a street-car upon the street, he becomes a traveler upon the public highway, and terminates his relation and right as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." And again, on page 229 of same book, "the special duty of a carrier to exercise a high degree of care begins only when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of the passenger to the carrier is assumed."

The cases cited by the author amply sustain the text, but not one of them is a case where the passenger was injured by a defective attachment to the vehicle from which the passenger alighted, or which he was about to enter. Unquestionably, the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it answerable for the conduct of third persons who, by neglect, cause injury in such situation to the passenger. But in the case of these particular conveyances, electric-cars, necessarily and immediately, on the car stopping at the end of the route the motorman proceeds to reverse ¹¹³ the trolley; ordinarily, this is attended with no dan-

ger to anyone; the act is performed while some of the passengers have alighted and are on the sidewalk out of reach of the trolley-pole; some are between the curb and the car, and probably some yet in the car. Can it be argued with any plausibility that, in changing the trolley-pole, the carrier owes no duty to its passengers who are not out of reach of danger from a part of the very vehicle in which they have been carried? Clearly, the duty to the passenger, under such circumstances, with that kind of vehicle, does not end the moment the passenger's foot touches the street. And so with the next starting car: She has traversed the sidewalk, and is on the pavement in front of the Wyoming House; the car moves up to the end of the line in front of her and stops; she steps outside the curb and moves toward it; the seats are being reversed; two or three passengers are already in the car; when within four or five feet of it she is struck by the broken pole, which of necessity is being changed. Why is she within reach of this peril? She is not a traveler on the highway, is not a resident who desires to cross the street; is not a mere spectator who, from curiosity or idleness, stands in that situation with reference to the car; she is there because, under the stipulations of the contract then in her possession, she has a right to take passage on that particular car at that point. In no sense is she one of the general public on the highway; she is at that point, at that particular juncture, because she could not receive the consideration of her contract, a passage to Mountain Lake, if she were anywhere else. If it were not for her contract, she would not be there at all. Surely, in such situation, under such circumstances, the carrier's duty to her was what it owed to a passenger, as much so as if her injury had been caused by a rotten step on the car. When she came within reach of the vehicle provided for her transportation the carrier's duty was, that she should not be injured by the vehicle, if the highest degree of care could prevent it. Such care appellant was bound to show affirmatively; it did not attempt to show it. Therefore, it is answerable in damages for her injury.

The judgment is affirmed.

STREET RAILWAYS—CARE REQUIRED.—A street railway company is bound to exercise the utmost skill, diligence, and human foresight in conveying its passengers, and is liable for slight negligence: *Spellman v. Lincoln etc. Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753; *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736.

CARRIERS—DEFECTIVE APPLIANCES—NEGLIGENCE.—An injury to a passenger, shown to have been caused by reason of some defect or imperfection in the carrier's appliances, or by some omission of duty or negligent act of his servants, raises a presumption of negligence on his part: *Hite v. Metropolitan St. Ry. Co.*, 130 Mo. 132, 51 Am. St. Rep. 555.

STREET RAILWAYS—PASSENGERS ON.—One who steps from a street railway to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every occupier, and over which the company has no control. His rights are those of a traveler upon a highway, and not of a passenger: *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456.

WELLS v. NEW ENGLAND MUTUAL LIFE INS. CO.

[191 PENNSYLVANIA STATE, 207.]

INSURANCE, LIFE—DEATH FROM ABORTION.—Under a life insurance policy providing that it shall be void if the insured dies in consequence of any violation of, or attempt to violate, any criminal law of the United States, or of any state where the insured may be, no recovery can be had if death results from the insured having voluntarily submitted to an illegal operation known to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. To permit a recovery in such case is against public policy.

The insurance policy in suit provided that it should be void if the insured died in consequence of any violation of, or attempt to violate, any criminal law of the United States, or of any state or country in which the insured might be.

W. S. M'Lean and J. B. Woodward, for the appellant.

H. W. Palmer and J. T. Lenahan, for the appellee.

²¹¹ **GREEN, J.** We are clearly of opinion that the learned court below should have affirmed the sixth point of the defendant and directed the jury to render a verdict for the defendant. There was no dispute about the facts of the case nor any question as to the law. That the deceased woman voluntarily submitted to an operation for abortion upon her person, and that she caused it to be done ²¹² by her own importunity to that end, and that she died from the direct effects of the operation, were established by the overwhelming testimony in the case, without the least shade of contradictory evidence. The substance of all this was conceded in the charge of the court to the jury, and the judge instructed the jury that if they believed that the operation was submitted to voluntarily, with-

out any justifiable medical reason, they should find for the defendant. The court affirmed the first and second points of the defendant which presented the subject in that aspect alone. But the learned court intimated that there might have been some other intervening cause that produced the death of the party, and submitted that question to the jury thus: "Did any other cause, taking in consideration where it was alleged it was performed, intervene, which produced blood poisoning or septicaemia and caused death? If it did, the company will have to pay the amount of this policy. If it did not, you should return a verdict in their favor." As there was not the smallest fragment of testimony as to the existence of any other cause of the death of the insured than the abortion, it was grave error to submit such a question to the jury. It only tended to mislead them and direct their attention to a false issue.

There was no question that the policy was a Massachusetts contract, and was governed by the law of that state. It was also shown that the supreme court of that state had decided in a case almost precisely similar to this that there could be no recovery on a policy of life insurance upon the ground of public policy if death results from the insured having voluntarily submitted herself to an illegal operation known to her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason: *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550, 21 Am. Rep. 541.

The testimony in the present case proved conclusively and without the least contradiction that the insured procured the operation for an abortion to be performed upon her person, and that she died in direct consequence of the operation. Dr. Crawford testified on this subject as follows: "She told me in the mean time that she had undergone an operation, she had an abortion. . . . She told me that it was done in Nanticoke one week, I think, or about one week, prior to that time; that it was done by the insertion of an instrument into her womb. She told me, ²¹³ too, that several previous attempts had been made by the same person to produce the abortion; that those attempts had failed. At the time she mentioned (a week before) she had again visited the abortionist, and he then performed a different operation, he did what he called dilating her womb, that is, introduced in and forced it open." He also testified that he told her she would certainly die, and she replied, "Oh, no, I am not going to die. I have had as many as six abortions or had an abortion produced as many as six

times, and I have always gotten well, and I will now." She repeated a similar statement in the presence of Mrs. Harvey, when she said, "Oh, pshaw, I am not going to die; I have had this done two or three times before," and to Mr. Whalen, who testified, "Well, she said she had that done several times before, that she would get over it"; and to Mr. Davison, who testified that she said, "She would not die, that this had been done before and she had always recovered." To Dr. Stoeckel, who delivered the foetus, she named the person who performed the operation, saying it was a Dr. Dan, of Nanticoke. She was asked: "Q. What did she say about Dr. Dan, if anything? A. She said that he had performed several operations which were not successful. Q. On her? A. On her. And she asked me, to use her own words, if I thought he hadn't made a botch of it. . . . Q. Whether or not she told you how many times she had been down to see Dr. Dan? A. She spoke of two or three times." Dr. Stoeckel also testified that she did not discover any malformation of the womb, and when asked whether she discovered any medical reasons for the abortion, replied, "I didn't discover anything of that sort." Dr. Crawford testified directly that she died from the effects of an abortion. In addition to this, the medical testimony all showed that the conditions resulting from an abortion were present, and that her death was the consequence of those conditions.

Against all this testimony there was not a particle of evidence in contradiction. There was not so much as a suggestion that there was any medical occasion for the operation, and the court was in serious error in submitting such a question to the jury. It was not necessary to establish by specific proof that there was no such necessity, because the whole of the testimony disclosed the purpose of the deceased to have the operation performed in order to get rid of an illegitimate foetus, but Dr. ²¹⁴ Stoeckel did testify that she could not discover any medical reasons for the abortion.

In the Hatch case, the supreme court of Massachusetts decided that there could be no recovery in such circumstances on the ground of public policy, saying: "We are of the opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be

‘contrary to public policy, and could not be enforced in the courts of this commonwealth.’ We see no reason to question the soundness of this proposition, and it has our approval. As we have a criminal statute imposing severe punishment for the perpetration of the crime of abortion, it follows that our own public policy corresponds with that pronounced by the supreme court of Massachusetts. But, in addition to this, the offense is a crime at common law. In 1 Wharton on Criminal Law, section 592, it is said: “At common law, the destruction of an infant unborn is a misdemeanor supposing the child to have been born dead, though if the child die subsequently to birth from wounds received in the womb it is homicide.”

In the case of *Mills v. Commonwealth*, 13 Pa. St. 633, we said: “Miscarriage, both in law and philology, means the bringing forth the foetus before it is perfectly formed and capable of living; and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word ‘abortion’ is synonymous and equivalent to miscarriage in its primary meaning. It has a secondary meaning in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been. It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with and violates the mysteries of nature in that process by which the human race is propagated. It is a crime against nature which obstructs the fountain of life and, therefore, it is punished.” In 1 Wharton on Criminal Law, section 599, it is said: “All parties concerned in the offense are responsible, whatever may be the part they take.” We do not think it can be questioned that the woman who solicits the commission of the ²¹⁵ offense, and submits her body for its perpetration, can be regarded as other than a participant in its commission, and is, therefore, criminally responsible. Viewed in that light in the present instance, the deceased comes directly within the operation of the prohibitory clause of the policy, for she was actually engaged in the violation of the criminal law of Massachusetts, where the contract was made, and of Pennsylvania, where she was at the time the offense was committed. The act was also highly immoral and illegal, as well on her part as on the part of the person who performed the operation, and, therefore, it would be contrary to public policy to permit a recovery. Upon the whole case, it was the plain duty of the court below to direct a verdict for the defendant.

The case of *Morris v. State Mutual Life Assur. Co.*, 183 Pa. St. 572, has no application, as its controlling facts are entirely different.

Judgment is reversed, and judgment is now entered in favor of the defendant.

INSURANCE—LIFE—DEATH FROM ABORTION.—No recovery can be had upon a policy of life insurance conditioned to be void if death results in or in consequence of the violation of law—if death results from the insured having voluntarily submitted herself to an illegal operation, known by her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason: *Monographic note to Conboy v. Railway etc. Assn.*, 60 Am. St. Rep. 163.

THANE v. SCRANTON TRACTION COMPANY.

[191 PENNSYLVANIA STATE, 249.]

RAILROADS—STREET RAILWAYS—NEGLIGENCE—RIDING ON PLATFORM.—One who voluntarily rides upon the outside platform of an electric street-car, when there are vacant seats inside the car, is guilty of negligence per se, and, if injured while in such position through the negligence of the railway company, cannot recover damages therefor.

J. P. Kelly and J. O'Brien, for the appellant.

E. Warren, E. N. Willard and H. A. Knapp, for the appellee.

252 MITCHELL, J. The proper and assigned place for passengers is inside the car. Unless he shows some valid reason to excuse him, a passenger is bound to put himself in the appointed place, and, if he does not, he takes the risk of his location elsewhere. This is the settled rule of all our cases. In *Germantown Pass. Ry. Co. v. Walling*, 97 Pa. St. 55, 39 Am. Rep. 796, it was said by the trial judge and affirmed by this court, that "it is the duty of the passenger to go into the proper, usual, and safe place, if it is possible to do so." And in *Mann v. Philadelphia Traction Co.*, 175 Pa. St. 122, it was said "the car was empty, and it was the clear duty of the passenger to take his seat on the inside."

In the present case, it is undisputed that there were vacant seats in the car, one of which the plaintiff could and should have taken. He chose instead to stay on the platform. In so doing he took all the risks incident to that position. The injury he received by being thrown against the dasher was the direct consequence of his position, and would not have been

received had he been inside. Whether he would have received some other injury, equal or greater, is conjectural and irrelevant. If he is to recover at all, it must be for injuries received, not for what he might have received under different circumstances.

The distinction sought to be made between injury from ordinary risks of the road and from a collision, the result of negligence of the carrier, is not sound. What the passenger took upon himself was the risk of his position from any cause. By going inside he could have put himself under the protection of the highest care possible, but he chose not to avail himself of this protection and thereby took his chances in the other place.

It is the long-settled rule that standing on the platform of a moving railroad train is negligence per se, and, on the other ²⁵³ hand, our cases have practically established that standing on the platform of an ordinary horse-car is not negligence per se, but raises a question for the jury. In respect to this subject, the electric trolley-car occupies a position between these two. As said by our brother Fell, in *Reber v. Pittsburg etc. Traction Co.*, 179 Pa. St. 339, 57 Am. St. Rep. 599, "the use of electricity as a motive power by passenger railway companies has created new conditions from which new duties arise. The greater speed at which cars are moved increases the dangers to passengers and to persons on the streets, and of these dangers all persons must take notice." The principle at the foundation of the rule is and always has been the same, but, in the development of methods of travel, the circumstances and conditions have changed. Rapidity of transit is no longer a mere convenience to the traveler, it has become a matter of vital interest to the general business of the community. The increased speed upon passenger railway lines, with its resultant danger, now approximates to that of steam railroads and, indeed in many cases, exceeds the speed of the fastest trains at a time not too remote to be within the memory of every judge on this bench, a time at which the rule as to steam cars was first established. The reasons which were potent in the establishment of that rule then are equally potent in its application now. We hold, therefore, that where there is room to be seated inside in the passengers' proper place, and no special and sufficient reason is shown why he should not avail himself of it, it is negligence per se to remain on the platform of a moving trolley-car.

Cases where the car is crowded, and no seat is available, rest

on a different basis. There the traveler, if he is to get on at all, must stand on the platform with its rods, et cetera, to hold by, or inside with a strap for that purpose. He is presented with a choice of evils, and his action must be judged by the jury, while, on the other hand, the carrier, by receiving him, undertakes and gives him assurance that it will take care of him and guard him against accident as far as the circumstances permit: *Germantown Pass. Ry. Co. v. Walling*, 97 Pa. St. 55, 58, 39 Am. Rep. 796.

Judgment affirmed.

STREET RAILWAYS—RIDING ON PLATFORM—NEGLIGENCE.—The fact that a passenger stands or rides on the platform or steps of a crowded car on which there are no vacant seats is not such contributory negligence per se as bars a recovery for injuries received through the negligence of the railway company, or its employes; and this is true although the passenger could have found a seat inside the car: *Note to Watson v. Portland etc. Ry. Co.*, 64 Am. St. Rep. 271. A passenger, by taking his stand upon the outside running-board of a street-car, assumes the risk of such damages as are obviously incident to such position, but the carrier, by accepting him there as a passenger, owes to him a high degree of care: *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 68 Am. St. Rep. 723. The rule in the principal case is sustained by *Andrews v. Capital etc. R. R. Co.*, 2 Mack. 137, 47 Am. Rep. 266. See the note to *Thirteenth etc. Ry. Co. v. Boudrou*, 37 Am. Rep. 710.

FISLER v. LAUBACH.

[191 PENNSYLVANIA STATE, 323.]

LIENS—RELEASE OF.—The holder of a first lien cannot release land of his debtor, taken in execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, against the latter's will.

LIENS—RELEASE OF—EXECUTION SALES—NOTICE.—If a release of a lien is filed of record, and on the same day the debtor files a refusal to accept such release, both appearing on the same docket, purchasers at execution sale are bound to take notice of such refusal.

LIENS—ORDER OF DISCHARGE OF—EXECUTION SALES.—In the absence of any equity to prevent him, a debtor has the absolute right to insist on the regular process of the law with its regular and usual result for the discharge of liens on his property, and their payment out of the proceeds according to their legal priority.

E. J. Fox and H. J. Steele, for the appellant.

F. W. Edgar and W. S. Kirkpatrick, for the appellees.

326 MITCHELL, J. This is a *scire facias* on a mortgage, and defense by the terretenant that the mortgage was discharged by the judicial sale at which he purchased. One Fulmer was the holder of a judgment which was the first lien on the land in question, and also on other land of the mortgagor and the latter's wife; the mortgage in suit was the second lien on the land in question, which was also subject to a third lien upon which it was taken in execution. Pending this execution Fulmer filed of record with the prothonotary a release of this land from the lien of his judgment, with intent to make the mortgage in suit the first lien and thereby save it from discharge, but on the same day the mortgagor filed a refusal to accept the release, and at the sale notice was given both of the release and of the refusal to accept. This is the case, stripped of all minor and collateral matters, as it was by the learned judge below, so as to present the clear question of law, whether the holder of the first lien can release land of his debtor, taken in execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, against the latter's will. The learned judge below was of opinion that he could not, and he was clearly right.

The argument of appellant is really comprised in the claim that a man may do what he likes with his own, and as a release of any of a debtor's property is pro tanto a surrender or gift of part of the creditor's right, the debtor has no standing to object. But you cannot give a man what he will not take. It may be imposed upon him by superior force, as, for instance, his assent to a judgment against him is imposed by the law without regard to his assent in fact. But it cannot be called a gift.

A release is usually matter of contract, and in this instance it was expressly put in that form, reciting a consideration moving from the debtor, and covenanting in return not to levy upon the land, et cetera, provided that the lien of the judgment upon the other lands of the debtor and his wife should not be invalidated. This was in substance, as well as in form, a contract which required **327** the assent of the other party. As a release is usually an advantage to the debtor, his assent may be presumed, as the assent of a legatee to a legacy is presumed, but subject to his right to reject it: *Tarr v. Robinson*, 158 Pa. St. 60.

It is urged by appellant that the moment the release was filed, the status of the mortgage in suit as the first lien became

fixed, and that being the state of the record the purchaser at the sale was bound by it, and the status of the property could not be altered by any act of the debtor. But this is assuming the very point in controversy. If the release alone appeared on the record, it might, as already said, be presumed to have been accepted, and under the principles illustrated by *Saunders v. Gould*, 134 Pa. St. 445, *Meigs v. Bunting*, 141 Pa. St. 233, 23 Am. St. Rep. 273, and similar cases, the purchaser would be bound by the record without regard to the conflicting notices given at the sale. But the release did not appear alone; the same record contained the repudiation of it. It is argued by the appellee, in opposition to this aspect of the claim, that the release did not appear in the *ad sectum* judgment index, which is kept in Northampton county, in lieu of a judgment docket under the act of 1827, and that the purchaser was not bound to look elsewhere. We need not, however, go into this question. The same record, the appearance docket, which gave notice of the release gave notice also of its repudiation, and if the intending bidder found one he necessarily found the other. The record, therefore, concluded nothing in appellant's favor, and we come back again to the starting point of the necessity of the debtor's assent.

The question, so far as we are advised, is new. We have not been furnished with any authority directly in point, nor have we found any, although the case of *Fritch v. Citizens' Bank*, 191 Pa. St. 283, decided at the present term, involves somewhat similar principles. As in that case, so in this, we rest the decision on the broad ground of legal rights as to liens when not controlled by special equities. The principle that a man may do what he likes with his own has its limitations. A judgment creditor has the right to make his debt out of any or all of the property of his debtor, but he cannot proceed altogether at his own will. He cannot, for instance, pass over the personalty and proceed first against real estate; he cannot divide his debt so as to collect only part at a time; if he takes several parcels of ³²⁸ land in execution, he cannot prevent the debtor from requiring the sheriff to sell them in a certain order, and, on obtaining sufficient funds from part to satisfy the execution, to refrain from selling the rest. The underlying principle is, that the debtor may protect his own interests so long as he does not embarrass the creditor in obtaining payment. And for such protection the debtor may rely on rights fixed by the general rules of law, or on the special equities arising on

the facts. The law fixes certain orders of procedure, and the debtor has rights and equities growing out of them.

When the property in suit was levied upon and exposed to sale under a junior judgment, it was subject to encumbrances whose standing was fixed by law, both in respect to priority, and also in respect to the effect of the sale upon them. In the absence of any equity to prevent him, the debtor had the right to insist on the regular process of the law with its regular and usual result, the discharge of the liens and their payment out of the proceeds according to their legal priority. Of this right he could not be deprived, and the legal effect of the sale be changed at the whim of the first judgment holder by a release attempted to be forced upon him without his consent. If there were any equities in the judgment creditor which would justify his interference, they should have been shown, and to affect the purchaser, the aid of the court invoked before the sale. What the equities were we do not know and it is now too late to inquire. The purchaser's rights were fixed by the sale.

The third and fourth specifications of error cannot be sustained. The evidence offered as to the mortgage of plaintiff was wholly outside of the records, and could not affect the rights of the terretenant purchaser.

Judgment affirmed.

THE RULE LAID DOWN IN THIS CASE seems to be unsupported by any other adjudicated cases, so far as we are aware. The question involved is both new and novel.

SWING v. MUNSON.

[191 PENNSYLVANIA STATE, 582.]

INSURANCE—FOREIGN POLICY—NONCOMPLIANCE WITH STATUTES.—A contract of insurance made with a foreign insurance company, and valid where made, cannot be enforced in another state, when in conflict with its statutes and the declared policy of its laws.

INSURANCE—FOREIGN POLICY—NONCOMPLIANCE WITH STATUTES.—A contract of insurance made with a foreign insurance company, though valid where made, cannot be enforced in another state where the insured property is located, when the insurance company has never complied with the conditions of the statute of the latter state essential to the making of a valid contract of insurance therein.

CONTRACTS—ENFORCEMENT OF UNLAWFUL.—Courts cannot lend their aid to the enforcement of unlawful contracts.

INSURANCE.—STATUTES MERELY REGULATING the methods of conducting the business of insurance, foreign and domestic, are but the exercise of the police power of the state in the interests of the public, and are valid and constitutional.

C. E. Sproul, for the appellant.

A. Candor and C. L. Munson, for the appellee.

584 DEAN, J. The appellant fire insurance company was a mutual company organized under the laws of the state of Ohio. The defendant, Edgar Munson, a member of the company, is a resident of Williamsport and a citizen of Pennsylvania. Immediately after the articles of incorporation were filed, on May 27, 1887, in the office of the secretary of the state of Ohio, the company commenced to issue policies of insurance against fire, not only in Ohio, but in other states. Before the final certificate dated October 1, 1888, authorizing it to do business, was issued, Munson made application for insurance upon property in Pennsylvania, and, in response, policies were issued to him on deposit of the proper premium notes. The application and notes were executed at Williamsport and transmitted by mail to the office of the company at Cincinnati, whence was mailed to him the policy. Ostensibly, there was no agent of the company in this state, but before Munson made out and transmitted his application, before he even knew of the existence of the company, one Hotchkin, a resident of Elmira, called upon him in Williamsport, and suggested that he take out policies in the company. It was denied that Hotchkin was an agent for the company; he was called an inspector, but the testimony of Munson and the correspondence between him and Williams, the secretary, establishes the fact beyond dispute that he acted for the company in procuring the insurance of Munson's 585 property in Pennsylvania, although the contract was consummated by direct correspondence between Munson at Williamsport and the officers of the company in Cincinnati. On December 18, 1890, by a judgment of the supreme court of Ohio, the corporation was dissolved, and James B. Swing, this appellant, appointed trustee for creditors and members to wind up its affairs. In consequence, there came into his hands nine notes of Munson; three of them were deposit or stock notes, deposited before the certificate of organization was issued, and three of them ordinary premium notes, delivered after the complete organization of the company. All of them, under the statute of Ohio, were subject to assessment for debts of the company.

An assessment was regularly made by the trustee; Munson refused to pay, and this suit was brought. At the trial this agreement was filed by counsel:

"It is hereby agreed by and between the plaintiff and defendant in the above-entitled case that the following facts are admitted with the force, effect, and validity as if the same had been established upon a trial of the cause by competent evidence, viz., that the Union Mutual Fire Insurance Company is a corporation, duly organized under the laws of the state of Ohio, and that said insurance company has never complied with any of the requirements of the several statutes of the state of Pennsylvania, obligatory upon insurance companies of other states seeking to transact business in the state of Pennsylvania."

After hearing the evidence, which established the material facts as we have narrated them, Munson's counsel asked the court to direct a verdict for defendant, for, among others, this reason: "2. It having been admitted that the Union Mutual Fire Insurance Company, never having complied with any of the requirements of the several acts of assembly of the state of Pennsylvania obligatory upon insurance companies of other states seeking to transact business in the state of Pennsylvania, the contract of insurance is invalid and unlawful, and there can be no recovery for any assessments on premium notes given by defendant."

The court reserved its answer to the point, and directed a verdict for plaintiff; afterward, in opinion filed, it entered judgment for defendant on the point reserved, and we have this appeal by plaintiff.

⁵⁸⁶ It is argued that the contract was made in the state of Ohio; it being valid there, under the constitution of the United States it is enforceable in Pennsylvania. The evidence does not show that the contract was made in Ohio; to our minds, it shows quite the contrary; the attempt by a pretense to shift the place of the contract to Ohio, to evade the prohibitions of our statutes, is so manifest that it would, perhaps, have warranted a peremptory instruction to the jury to find for defendant on the evidence. But that we may meet a more important question, because it affects the interest of all foreign insurance companies that seek to do business in this state, we prefer to assume that the contract was made in Ohio, and is lawful there. It was a contract, however, in direct violation of the laws of this state; it was the indemnification of a citizen of Pennsylvania against loss by fire on property wholly within

Pennsylvania; without regard to where the contract was made, the subject of it was property within this state: it is the attempt of a foreign insurance company to do business in this state in violation of the laws of this state.

Section 9 of the act of April 4, 1873 (Pub. Laws, 20), declares that: "It shall be unlawful for any person, company, or corporation to negotiate or solicit within this state any contract of insurance, or to effect an insurance or insurances, or pretend to effect the same, or to receive and transmit any offer or offers of insurance, or receive or deliver a policy or policies of insurance, or in any manner to aid in the transaction of the business of insurance without complying fully with the provisions of this act."

The eighth, tenth, eleventh and twelfth sections prescribe in detail what conditions shall be performed by the foreign company precedent to the transaction of business, and specify penalties for neglect.

Then, the supplement of May 1, 1876, makes it a misdemeanor in any person to act as agent within this state for a foreign company that has not complied with the provisions of the original act. Then follows the act of June 20, 1883, and then that of April 26, 1887, section 1 of which latter act declares: "That any insurance company or association not of this state, doing business without authority agreeable to the provisions of this act shall forfeit and pay to the commonwealth the sum of five hundred dollars for each month, or fraction thereof, during each ⁵⁸⁷ month, on and after the passage of this act, which such illegal business was transacted, and be prohibited from doing business in this state until such fines are fully paid. And that any person or persons, or any agent, officer or member of any corporation paying, or receiving, or forwarding any premiums, applications for insurance, or in any manner securing, helping, or aiding in the placing of any insurance, or effecting any contracts of insurance upon property within this commonwealth, directly or indirectly, with any insurance company or association not of this state, and which has not been authorized to do business in this state under the terms of this act, shall be guilty of a misdemeanor, and, on conviction thereof, shall be sentenced to a fine of not less than one hundred dollars nor more than one thousand dollars, and, upon conviction of a second offense, shall be sentenced to pay a like fine and undergo an imprisonment not exceeding one year, or either, in the discretion of the court," et cetera.

All these acts were violated by this appellant corporation; it made no pretense of observing the provisions of any of them. Assume that the contract, because made in Ohio, could have been enforced in the courts of that state, it does not follow that the courts of this state will lend their aid to the enforcement of a contract in violation of its own policy as declared in its laws. If these laws contravene the constitution of the United States or that of Pennsylvania, our courts would enforce the contract, because it would then be lawful here, as in Ohio; but, if our statute be constitutional, then the contract is directly opposed to our declared law. There was a time when I doubted the constitutionality of any statute prohibiting the exercise of the common-law right of contract in the individual, as to things not *malum in se*; but in *Commonwealth v. Vrooman*, 164 Pa. St. 306, 44 Am. St. Rep. 603, a majority of this court, in a very able opinion by our late brother Williams, decided otherwise. That case is now the law. It decided that the regulation of the business of insurance might extend so far as to prohibit the citizen from making a contract of indemnity with other than a corporation, without violation of our bill of rights. Certainly, if the freedom of contract could be thus restricted, the legislature could prescribe terms, on observance of which foreign corporations could only do business within the state, so that the constitutionality of ⁵⁸⁸ these acts is no longer open for discussion, and it would be a waste of time to again review the cases. The case before us is, as said by the supreme court of Wisconsin, *Rose v. Kimberly*, 89 Wis. 545, 46 Am. St. Rep. 855: "The question arising is not whether these contracts can be enforced in the courts of Illinois where they were made; the question here presented is, whether the courts of this state will enforce a contract plainly and squarely opposed to the public policy and laws of this state." Our legislature had the constitutional power to enact these statutes; under them, this contract is unlawful in this state; shall our courts, by enforcing it, declare it lawful? This would be subversive of the very policy our state had adopted; it would, as to results, repeal all the statutes regulating contracts with foreign insurance companies. It is argued that Munson had the benefit of this contract of indemnity while the contract was in force, and it is inequitable to permit him to escape payment of his share of the losses. This argument would have weight if the parties alone concerned were Munson and the insurance company; but, in enforcing a policy in the interests of the whole public, the

law takes but little note of the conduct of the immediate parties to the contract; the rule is, that courts, having in view public interests, will not lend their aid to the enforcement of an unlawful contract: *Mitchell v. Smith*, 1 Binn. 118, 2 Am. Dec. 417; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737; *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131, and many other cases. *Commonwealth v. Biddle*, 139 Pa. St. 609, is cited by appellant as in conflict with this view; but appellant misapprehends the scope of the decision when viewed in connection with the facts before the court. That was a criminal prosecution by the commonwealth against the owner of property, for violation of the act of 1887, prohibiting any person from paying or forwarding any premiums or in any way aiding a foreign insurance company to, without authority, do business within this state. It was held that the penal provisions of the act referred to brokers and other agents of foreign companies attempting to do business within the state, and not to owners who executed contracts within the territorial limits of another state. The decision is best illustrated by the language of our brother Mitchell in the opinion, thus: "We entertain, therefore, no doubt of the power of the legislature to make the insurance of his property in an unauthorized foreign company by an owner criminal, if ⁵⁸⁰ done in this state. But such a statute would be not only an unusual, but a very harsh and extreme interference with the general right of a citizen to manage his private affairs in his own way, and we should not attribute such an intent to the act in question, unless its terms be plain or the implication unavoidable." And then the closing sentence of the opinion is as follows: "And certainly, when we are asked to say that the legislature meant so unusual and extreme an interference with the rights of citizens in the management of their own private affairs, we may demand that such intent shall be shown in clear and unambiguous words." The case pointedly decided, that no indictment, under the ambiguous language of the act of 1887, could be sustained against the owner for a contract of insurance made outside the state. It is true, a doubt as to the constitutionality of the act under the constitution of the United States is suggested, but in *Commonwealth v. Vrooman*, 164 Pa. St. 306, 44 Am. St. Rep. 603, decided four years later, we held, after the fullest consideration that statutes merely regulating the methods of conducting the business of insurance, foreign and domestic, were but the exercise of the police power of the state, in the interests of

the public, and for this, *Powell v. Pennsylvania*, 127 U. S. 678. *Slaughter House Cases*, 16 Wall. 36, and others were cited. There is no authority in this state for holding otherwise. We, therefore, hold the court below rightly refused to enforce this contract, because, in making it, the insurance company had not complied with the laws of this state on the subject of insurance of property within the state.

The judgment is affirmed.

INSURANCE — FOREIGN CORPORATIONS — NONCOMPLIANCE WITH STATUTES.—A fire insurance policy issued by an insurance company, organized under the laws of one state, upon property in another state, without a compliance with the laws of the latter state, providing that foreign insurance companies, which issue policies on property in that state without complying with its laws, are liable to a penalty, but imposing no duty or prohibition on the person so insured, is valid and binding on the company: *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 20 Am. St. Rep. 395; *State etc. Ins. Assn. v. Brinkley Stave etc. Co.*, 61 Ark. 1, 54 Am. St. Rep. 191. But if a statute declares that no foreign insurance corporation shall, directly or indirectly, take any risks or transact any business of insurance in a state until it has complied with the requirements of such statute, a contract insuring property in such state made by the corporation in the state of its creation will not support an action in the state where the property is situated to recover an assessment made against the insured: *Rose v. Kimberly*, 89 Wis. 544, 46 Am. St. Rep. 855, and note.

CONTRACTS—ENFORCEMENT OF FOREIGN.—Contracts and liabilities recognized as valid by the laws of the state or country where made, or established, may be enforced in the courts of another state or country where the action is brought, unless contrary to morals, public policy, or the positive law of the latter, in which event they will generally not be enforced: *Monographic note to Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 774.

O'MALLEY v. PARSONS

[191 PENNSYLVANIA STATE, 612.]

MUNICIPAL CORPORATIONS—CARE OF STREETS AND HIGHWAYS—DUTY TO PROVIDE GUARDS.—Whenever, owing to the existence of embankments or excavations alongside of a public street or highway it would be reasonably prudent and necessary to erect and maintain railings, or other suitable barriers, to prevent accidents to passengers traveling along, coming into, or leaving such street or highway at customary and proper points, it is the duty of the proper municipality to provide such guards or barriers, and its neglect to do so renders it liable in damages to those who, in the exercise of ordinary and reasonable care, themselves sustain injury in consequence of such neglect.

MUNICIPAL CORPORATIONS — CARE OF STREETS— NEGLIGENCE, WHEN QUESTION FOR JURY.—If, in an action

against a municipality to recover for injuries from being thrown over an embankment while driving along a public street or highway recently excavated, and then undergoing repair, without guards or barriers, the evidence shows that the accident happened on a dark night, that plaintiff did not know of the alterations in the street, that prior to such alterations the street was safe, that there was plenty of public ground under the exclusive control of the municipality on which suitable guards or barriers could have been erected, the questions of the negligence of the municipality in thus leaving the street unguarded, and of the contributory negligence of the plaintiff in thus driving along the street, are both questions of fact for the jury to determine under proper instructions.

P. J. Sherwood, for the appellant.

J. McGahren, E. K. Little and P. A. O'Boyle, for the appellee.

615 STERRETT, C. J. This action of trespass was brought by the plaintiff, a practising physician, to recover damages for injuries resulting from his being thrown from his carriage over an unguarded embankment into a highway formerly called "Main road," but now known as "Main street," in the borough of Parsons.

Main street was originally laid out in 1818, and its width fixed by the court at fifty feet. After the incorporation of the borough defendant in 1876, Main street within its limits was accepted and since recognized as one of its streets. A large tract of land in the neighborhood, including a settlement on the south side of Main street, known as "Scranton Patch," was held by the Lehigh Valley Coal Company, as lessees, for mining purposes. In 1866 or 1867, three rows of houses were built on this tract, a short distance back from Main street, for the use of employés of the mines. The houses were built at an angle to Main street, the middle row extending, in the direction of the street, several houses beyond the first row. The third row was located back of the middle row and not contiguous to the street. The open spaces in front of the houses were used as a means of ingress and egress to and from the houses and Main street. Although evidence was introduced to prove acceptance by the borough defendant of these passageways as streets, the learned trial judge instructed the jury that the evidence was insufficient and that said passageways must be treated as private ways. The houses in the middle row, at the end next to Main street, were on a slight embankment which narrowed as it approached **616** Main street, and ended in the same, at the end house. In its original condition, the terrace in front of these houses next to Main street was a

gradual slope, and the houses were approached from any point on Main street. Sometime prior to the accident, the borough authorities in improving Main street cut down the driveway thereof in front of the terrace, thus making the bank more abrupt. Immediately opposite the second house from the end next Main street—the house professionally visited by the plaintiff on the night of the accident—there was a depression in the embankment which, after Main street was improved, was used as a means of approach to the houses from said street. The evidence was conflicting as to the width of Main street after the grading was completed. Mr. Stahl, a surveyor called by the plaintiff, testified that it was forty-eight or forty-nine feet wide, but that it narrowed down to thirty-five feet at the point where the accident happened, only a short distance beyond. No fence or guard was placed along the embankment.

There is no controversy as to the way in which the accident happened. On the night of January 29, 1894, a cold, rainy night, plaintiff, with a pair of horses, a driver and covered phaeton, on his return from the borough of Parsons to Wilkes-barre, turned off Main street by a private wagon way and stopped at the first house, thirty or forty feet from the street. After visiting his patient in that house, he resumed his seat and undertook to drive directly out to Main street. The accident is briefly described by plaintiff thus: "There was no difficulty in getting in there any time, night or day, and, of course, intending to go down where I had previously gone, not knowing there was any break in the road, or any precipice or bank, first thing I knew horse went over, and secondly, the carriage, and out we went. It was all done in an instant, and it was all over." Plaintiff's leg was broken, and he was otherwise severely injured.

Under all the evidence, the case was necessarily for the jury. If Main street was opened to its full width, the borough would have no right to go upon private land to erect guards or barriers. If, on the other hand, a considerable portion of ground dedicated to uses of a public way or street projected out into ⁶¹⁷ Main street as opened, and if, in consequence of the cutting down that was done by the borough authorities, it was made dangerous to the traveling public, even approaching on private ways, the borough was negligent in not properly guarding the abrupt embankment or cut: *Burnham v. Boston*, 10 Allen, 290; *Orme v. Richmond*, 79 Va. 86, and authorities there cited. In the former it was held: "If a traveled way, either pub-

lic or private, over lots adjoining a public street in a city and leading into that street, for a long time before and after the existence of an excavation in the street, has been so much used by persons having occasion to pass as to become known as a common way for travel, and to make it reasonably necessary for the city in the exercise of due and proper care to provide a barrier for the purpose of preventing travelers, who pass over such way from the adjacent lots into the street and use due care, from falling into the excavation, and the city has unreasonably omitted to erect such barrier, it is guilty of negligence and liable for any injury happening to a traveler in the street by reason thereof." In *Orme v. Richmond*, 79 Va. 86, the municipal authorities lowered the grade of two streets, making a precipice of several feet at their intersection, at which point there was an old and much used pathway over an adjoining lot into those streets. The city had placed barriers at the ends of the streets, but nothing to warn passengers along the pathway. A traveler, ignorant of the precipice and without negligence on her part, at night, walked along the pathway down into the precipice, causing her great damage. In an action against the city, it was held that she had a right of action against the city, and that the trial court erred in sustaining a demurrer to her claim.

In this class of cases, the underlying principle—recognized by approved text-writers and many of our own cases as well—is that whenever, owing to the existence of embankments or excavations alongside of a public street or highway, it would be reasonably prudent and necessary to erect and maintain railings or other suitable barriers to prevent accidents to passengers traveling along, coming into, or leaving the public street or highway at customary and proper points, it becomes the duty of the proper municipality to provide such guards or barriers; and its neglect to do so will render it liable in damages to those ⁶¹⁸ who, in the exercise of ordinary and reasonable care themselves, sustain injury in consequence of such neglect.

The evidence shows that between the top of the cut or steep bank, over which plaintiff was thrown, and the southerly line of the street there was plenty of public ground (from ten to fifteen feet wide) on which to put up railing or other suitable barriers. If the embankment projected in the manner described by plaintiff's witnesses, the borough had exclusive control over this ground, either to fence it off or to guard it in such man-

ner as to make it reasonably safe. It was for the jury to determine what the condition of Main street at the point in question was, and what the borough could and should have done under the circumstances. In addition to the evidence presented on the trial, the jury were permitted to view the premises. In view of the testimony given in court, such personal view was worth more in aiding them to form an intelligent conclusion in the premises than all the witnesses that could be called. On the question of contributory negligence it would have been error for the learned trial judge to have taken the case from the jury. Plaintiff testified positively that he did not know of the alterations and grading done of the street, and the witnesses generally agree that before the grading, et cetera, was done, it was entirely safe to drive over that part of the street—going in or leaving it at any point.

The case was submitted to the jury with well-guarded instructions, which were quite as favorable to the borough as it had any right to expect. We find nothing in any of the assignments of error that requires special notice. They are all overruled, and the judgment is affirmed.

MUNICIPAL CORPORATION—CARE OF STREETS—LIABILITY.—A municipal corporation is answerable for injuries caused by the unsafe condition of a public way under its control, which it has suffered to remain, after notice, when the defect arose in the execution of a plan adopted by the corporation for local improvement: *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, and note. See monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 384. A municipal corporation, when private or public improvements are being made in its streets, must guard them so as to protect travelers from resulting injuries therefrom, and, if necessary to prevent accident, should, by some barrier, close the street against the public, so that no harm may happen if the work should be delayed: *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, and note.

MUNICIPAL CORPORATIONS—STREETS.—THE NEGLIGENCE of a municipal corporation in the care of its streets, by reason of which injury has resulted, is generally a question of fact for the jury: See *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853, and note; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

EX PARTE WORLEY.

[54 SOUTH CAROLINA, 208.]

PARTITION OF HOMESTEAD—ESTATE OF DECEDENT.
THE CHILDREN of an intestate, though the issue of a former marriage, are, as well as the widow, entitled to the benefit of a homestead exemption in the real and personal property of the decedent. Hence, if the children are adults, a homestead in the decedent's land, as well as a homestead exemption in his personal property, may be set off to the widow and children, and be at once partitioned among them.

Petition by Emaline Worley for a homestead in the estate of her husband, Coleman Worley. The petitioner appealed from a decree of the circuit court.

Fred. D. Bryant and Thomas S. Moorman, for the appellant.

Robert B. Scarborough, for the appellee.

²⁰⁸ **GARY, J.** The "case" states the following facts: Coleman Worley died in 1895, leaving, as his heirs-at-law, his widow, Emaline Worley, and his two sons, Jackson Worley and Rey Worley, the issue of a previous marriage, both of whom were of age at the time of the death of the intestate. Prior to and at the time of the death of intestate, the said Jackson Worley, an unmarried man, lived with his father, as a member of his family, and he still lives with petitioner, his stepmother, in the residence of the intestate; the other son, Rey Worley, lived then, and still lives apart, on ²⁰⁹ land of his own, being married, and is himself the head of a family. On the 17th of Janu-

ary, 1896, Rey Worley was duly appointed administrator of the personal estate of the intestate, and, having duly qualified as such, obtained from the proper authority an order for the sale of the personal property, which was sold. On the 12th of March, 1896, Emaline Worley filed a petition with the clerk of the court of common pleas, praying that homestead be assigned and set off to her in the real and personal property of the intestate. Commissioners were duly appointed and made return, setting off to the petitioner, as her homestead, the tract of land containing nine hundred acres, more or less, valued at one thousand dollars, and as her personal property exemption the sum of thirty dollars and fifty-five cents, due by her to the administrator for articles purchased by her at his sale, together with the sum of four hundred and sixty-nine dollars and forty-five cents of the amount in the hands of the administrator, making the total amount five hundred dollars. To this return Jackson Worley filed exceptions, which were heard by the circuit judge, who rendered a decree adjudging that the petitioner was not entitled to any homestead exemption, and that her petition be dismissed. From this decree the petitioner appealed to the supreme court, which reversed the circuit decree and remanded the case to the circuit court for the purpose of carrying out the views announced in its opinion. What was done thereafter appears in the decree of his honor, Judge Gage, which is as follows: "Upon the call of this cause, the petitioner's attorney submitted a 'proposed amendment' of the return made herein by homestead commissioners, on the 18th of June, 1896. The proposed object of the proposed amendment was to conform the return to the views of the supreme court as expressed in this cause, and set out in the last or eighth paragraph of the opinion: See Ex parte Worley, 49 S. C. 60. The petitioner's attorney desired an order, confirming the return of the 18th of June, 1896, so amended, and directing the administrator of Coleman Worley to pay into the hands of Emaline Worley, for a homestead exemption in personal property, four hundred and sixty-nine dollars and forty-five cents of money in the administrator's hands. The 'proposed amendment' after ²¹⁰ a preamble concludes with this 'declaration,' to wit: 'That it was their intention to do only what the law directed in the premises. That they did not suppose it was in their power, nor did they have the remotest thought, of limiting or restricting the benefit of the homestead, but simply appraised the same and made return

thereof, as they were directed, believing that the law provided this to the petitioner, as the widow and the head of the family of her deceased husband, for the enjoyment of herself and such family as remained with her.' The attorney for the other two heirs-at-law of Coleman Worley (sons) resisted the proposed amendment as irregular and without legal status, and resisted the payment of the four hundred and sixty-nine dollars and forty-five cents of the money in the administrator's hands to petitioner. The return of homestead commissioners, dated the 18th of June, 1896, was adjudged by the supreme court to be unlawful, if by it the homestead was set off to the widow alone. The return was not in totidem verbis before the supreme court. All that court knew about its terms was gathered from an indefinite reference to its terms, made in Judge Aldrich's decree. In my judgment, that return does limit the homestead to the petitioner alone, and by inference excludes the two sons of Coleman Worley from its benefits. The writ issued by the clerk directed the commissioners to set the homestead 'off to the said Emaline Worley, widow of the said Coleman Worley, such portion of the said land as you value at one thousand dollars, and she may select; and, also, set apart to her, of the personalty of the said deceased, money or property, or both, to the amount and value of five hundred dollars.' The return followed the writ, and undertook to set aside 'for the petitioner, as her homestead, all the tract of land, et cetera,' and it further undertook to set aside 'to the petitioner, as her personal property exemption,' personal property of the value of five hundred dollars, of which sum four hundred and sixty-nine dollars and forty-five cents was money in the administrator's hands. If the return in this respect be repugnant to the law, as stated in the opinion of the supreme court, it is essentially wrong. The commissioners had no power to amend it. They can only ²¹¹ follow a direction by the clerk, and the direction has the same infirmity as the return; and, were the amendment within the power of the commissioners, it does not mend the defect in the original. This court can order the writ to be so amended as to direct the homestead to be set aside to the widow and children of Coleman Worley, deceased; can set aside the return made the 18th of June, 1896, and direct a new return to be made, by the same or other commissioners, as the clerk may direct in conformity with the amended writ. The next issue betwixt the parties is the right of the petitioner to have four hundred and sixty-nine dollars and forty-five cents in money paid

into her hands by the administrator, as part of a personal property exemption. This issue was made in the fourth exception to the return, when it came before Judge Aldrich. The judge did not pass upon that question. Nor has the supreme court passed upon it. But that question is not properly before this court. When a new return is made in conformity with the opinion of the supreme court, exceptions may be taken to it, on the ground last stated. It is ordered, therefore, that the return of the homestead commissioners, made the 18th of June, 1896, be set aside, that the writ of the clerk be so amended as to require the homestead to be set off to the widow and children of Coleman Worley, deceased, and that a new return be made in conformity thereto."

The petitioner appealed, alleging that the circuit judge erred in certain particulars, the first of which is as follows: "1. It appearing to the court that there were in existence but two of the children of Coleman Worley, one of whom resided apart from the family residence, on premises of his own, and was himself the head of a family, and the other residing in the family residence, and that this condition existed both at the time of the death of the intestate and ever since, in directing that 'the writ of the clerk be so amended as to require the homestead to be set off to the widow and children of Coleman Worley, deceased, and that a new return be made in conformity thereto,' without any direction or indication as to which of said children is ²¹² entitled to participate in the use of such homestead." The appellant contends that this court, in its former opinion, decided that only Emaline Worley and Jackson Worley had the right to claim the homestead exemption. After stating elsewhere that the homestead was intended for the benefit of the "widow and children," the opinion concludes as follows: "There is only one other matter remaining to be considered, as to which the court feels some embarrassment, arising from the fact that the return of the homestead commissioners is not before us. The fifth exception to that return imputes error to the commissioners in assigning the homestead to Emaline Worley alone; whereas, if assigned at all, it should be for the benefit of the respondent, Jackson Worley, as part of the family of the said Coleman Worley, as well as for the benefit of the said Emaline Worley. Now what the return does contain, we do not know, as it is not before us; but from a remark made in the circuit decree, which will presently be quoted, we suppose that the circuit judge considered that in the return the home-

stead was assigned to Emaline Worley exclusively. It does not appear that the circuit judge passed specifically upon this fifth exception; for, while he does quote what he designates as the fifth exception, the quotation shows, beyond dispute, that he was really considering the sixth; and he nowhere else alludes to the point raised by what is really the fifth exception, unless it be when he uses the following language: 'To grant the demand of the petitioner is to give her the *exclusive* use of nine hundred acres of land and five hundred dollars in money during her life, *at the expense* of the children of her deceased husband by his first wife, and in utter disregard of their rights as heirs-at-law and distributees of the estate of their father' (italics ours). From this language, it may be reasonably inferred that the circuit judge regarded the return as assigning the homestead to the petitioner, Emaline Worley, for her exclusive use and benefit. If the return does, in fact, so provide, then in that respect it was erroneous, and should be corrected. Section 2129 of the Revised Statutes expressly provides that where the **213** intestate dies leaving a widow and children, the widow and children, not the widow alone, shall be entitled to the homestead exemption. The judgment of this court is, that the judgment of the circuit court be reversed, and the case remanded to that court, for the purpose of carrying out the views herein announced." The language just quoted, when considered in connection with the entire opinion, shows that the principal question discussed and decided was, whether the widow was entitled to homestead, and incidentally whether she alone was entitled to homestead. The language of the court is comprehensive enough to include the right of both the sons to the enjoyment of the homestead. But even conceding that the decision does not go to the extent of deciding that Rey Worley was entitled to participate in the enjoyment of the homestead, let us see what his rights are. In the case of *Yoe v. Hanvey*, 25 S. C. 94, it is admitted that the homestead creates no new estate, and that neither the constitution nor the statutes enacted in conformity to it undertake to divest any previous estates. The majority of the court, however, in that case held that the adult children of the deceased did not have the right to partition the land which had been assigned to the widow as a homestead, and that the widow was entitled to enjoy it, like dower, during her lifetime. In the case of *Ex parte Ray*, 20 S. C. 248, the court says: "We do not understand the homestead laws as designed to alter or in any way affect the statute for the

distribution of intestates' estates, and they do not even purport so to do." The right of homestead is simply a shield that protects certain property from attachment, levy and sale, and it has never been held by this court, except in the case of *Yoe v. Hanvey*, 25 S. C. 94, that the homestead laws had any other effect. The conclusions of the court in that case were not in accord with the admitted principles therein stated, nor with other cases in this state bearing upon the question. The correct view upon the subject was expressed in the dissenting opinion of Mr. Chief Justice McIver, in *Yoe v. Hanvey*, 25 S. C. 94. As that case was not based upon sound principles, and ²¹⁴ is antagonistic to other cases in this state, it is hereby overruled; in fact, it was practically overruled by the former opinion in this case. These views show that there was no error on the part of the circuit judge in ordering that the writ be so amended as to require the homestead to be set off, not only to the widow, but to Jackson Worley and Rey Worley also.

The next particular alleging error is as follows: "2. In refusing to entertain the petitioner's motion for an order directing the administrator to pay over to the petitioner, as the widow and head of the family of Coleman Worley, the chattel exemption in his hands, arising from the sale of the personal property of said Coleman Worley." Even if the motion had been entertained, the appellant would not have been entitled to such an order. The said property was subject to partition among the widow and children just as any other property of the intestate. The views hereinbefore expressed in considering the first exception render unnecessary any further consideration of the question raised by this exception, which must be overruled, as the order was free from error. In order to prevent confusion in the distribution, it may be well to state that the petitioner must account for the thirty dollars and fifty-five cents, amount due for purchases made by her.

It is the judgment of this court that the order of the circuit court be affirmed.

HOMESTEAD—WIDOW AND CHILDREN—PARTITION.—If the owner of a homestead dies without disposing thereof, it passes to his widow and children. After all the children have attained their majority, their homestead rights cease, and the widow is entitled to the exclusive use and occupancy of the homestead: *Notes to Kessinger v. Wilson*, 22 Am. St. Rep. 228; *Sanders v. Russell*, 21 Am. St. Rep. 29. If a man, after having secured a homestead for his minor children, remarries and has another child, the second wife and her child become members of the family and entitled to rights in the homestead, which do not terminate upon the arrival

at majority of the children of the first wife: Note to Kessinger v. Wilson, 22 Am. St. Rep. 228. A widow entitled to a homestead may maintain a petition for partition, and have her estate assigned to her in severalty, whether she is in possession or not: Atkinson v. Atkinson, 40 N. H. 249, 77 Am. Dec. 712. Children who have attained their majority cannot claim partition of the homestead as against the mother and minor children who continue to occupy it: Hoffman v. Neuhaus, 30 Tex. 633, 98 Am. Dec. 492. For a monographic note on partition in connection with the distribution of the estates of decedents, see Buckley v. Superior Court, 41 Am. St. Rep. 140-151.

BALTZEGER v. CAROLINA MIDLAND RAILWAY COMPANY.

[54 SOUTH CAROLINA, 242.]

NUISANCE—ACCUMULATION OF SURFACE WATERS—ACTION FOR DAMAGES.—No action for damages can be sustained against railroad companies, or other landowners, for the damming up and accumulating of surface waters upon their lands unless a nuisance per se is thereby created.

NUISANCE—ACCUMULATION OF SURFACE WATERS—ABATEMENT—SUFFICIENCY OF COMPLAINT.—The allegations of a complaint to abate the accumulation of surface waters alongside of a railroad track as a nuisance are insufficient, unless they show the existence of a nuisance per se; that is, something creating danger, at all times, and under all circumstances to life, health, or property.

NUISANCE—ACCUMULATION OF SURFACE WATERS IS SUBJECT TO LAW OF.—The right of railroad companies, or other landowners, to dam up and accumulate surface waters on their premises is subject to the general law of nuisances, but they are not answerable, as for a nuisance, without it appears that a nuisance per se has, in fact, been created.

NUISANCE—ACCUMULATION OF SURFACE WATERS—ACTION FOR DAMAGES.—A nuisance caused by a railroad company or other landowner in damming up and accumulating surface waters in a town, is public in its nature, but one who suffers thereby cannot recover damages therefor without alleging some special or peculiar damage to himself. Unless it differs in kind, as well as degree, from the damage which it may be reasonably expected will be sustained by the public generally, the complaint states no cause of action.

Action by Baltzege against the railway company for damages, and to abate a nuisance. The plaintiff appealed from an order sustaining a demurrer and dismissing the complaint.

G. W. Croft & Son and R. L. Gunter, for the appellant.

Henderson Brothers and Robert Aldrich, for the appellee.

243 GARY, J. The appeal herein is from an order sustaining a demurrer to the complaint, on the ground that it does not

state facts sufficient to constitute a cause of action. The complaint is as follows: 1. The first paragraph merely alleges the corporate existence of the defendant: "2. That the plaintiff is the owner of the following described real estate, to wit: All that lot of land, with the improvements thereon, containing three acres, more or less, situate within the corporate limits of the town of Wagener, . . . which said premises lie west of the railway track of the defendant ²⁴⁴ in the said town of Wagener, and within a hundred feet from the defendant's line of railway. That the dwelling-house of the plaintiff is upon said premises, and the same is now, and has been for several years past, occupied and used by the plaintiff and his family; 3. That near to the plaintiff's residence, and running by the same, and across the line of the defendant's railway track, is a hollow or depression in the land, in and through and down which the surface water, in times of rains and floods, has been accustomed by nature, from time immemorial, to pass and flow through, and thereby affording a complete passage and drainage for all surface waters which were collected and entered into said hollow; 4. That about the year 1886 or 1887, the Blackville, Alston & Newberry Railroad Company, a corporation under the laws of this state, constructed the line of railway now owned and operated by the defendant, and, in building the line of said railway across the said hollow, caused a high embankment to be created, and also dug deep ditches on the upper and lower sides of said embankment, which said embankment completely stopped the flow and passage of the surface water down said hollow, as it was accustomed by nature to flow, and in times of rains and floods caused the said water to accumulate in a pond on the upper side of said railway track, and also caused a considerable quantity of water to accumulate and gather in the said ditch on the lower side of said railroad track; and the said water, so collected, remains in said ditches, and in the pond formed on the upper side of said embankment, for a considerable while after each rain and flood, and it becomes stagnant and emits nauseous odors and gases, which poison and pollute the air in and around the plaintiff's said dwelling-house, and renders the same unhealthy and dangerous to live at, and has within the last three years caused annoyance, sickness, pains, and suffering to the plaintiff, and also to the members of his family, and has within that period caused the death of one of plaintiff's children, who was made sick by the offensive and nauseous gases emitted from said stagnant waters.

And the ²⁴⁵ plaintiff alleges that the collection and ponding of such waters, as aforesaid, is a nuisance to him, dangerous to the health of himself and family, and the same ought to be abated; 5. The plaintiff further alleges that the Blackville, Alston & Newberry Railroad Company, some five or six years ago, changed its name to the Carolina Midland Railroad Company, and, under said last name, the defendant owns and maintains said embankment and ditches across said hollow, and still maintains and continues said nuisance. And the plaintiff further alleges that the said railroad company, when building said road, or at any time since, could have, without much expense, put a culvert under and across said embankment, which would carry off the surface water and remove said nuisance; but that the said railroad company carelessly and negligently built said embankment so as to cause said nuisance, and that the defendant, although requested to so abate the same, have, unmindful of their duty and in wanton disregard of the plaintiff's rights and health, failed to do so, and negligently and carelessly still maintains said nuisance, to the damage of this plaintiff in the sum of two thousand dollars."

The first question which will be considered is, whether damages caused by the accumulation of surface water are actionable. In 24 American and English Encyclopedia of Law, 907, it is said: "A great divergence has arisen in the rules adopted in the various states as to the right of the lower proprietor to obstruct the flow of surface water, and to repel it from his premises, by means of an embankment or other obstruction. Some states have adopted what is known as the civil-law rule, which subjects the lower estate to the easement or servitude of receiving the flow of the surface water from the upper estate. Other states, again, have adopted what is known as the common-law rule, by virtue of which the lower proprietor may do as he pleases with his land, and may receive, repel, or divert surface water flowing thereon, at his pleasure. In one or two states, again, a modified rule has been adopted, under which each case is to ²⁴⁶ be governed by its circumstances, and the right to obstruct or repel the flow of surface water is to be determined by the reasonableness of the use of the lower estate." The rule of the common law as to surface water is, perhaps, nowhere more clearly stated than in 24 American and English Encyclopedia of Law, 917: "Under this rule it is held that the right of the owner of land to occupy and improve it in such a manner and for such purposes as he may see fit, either by

changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any position of it will cause water, which may accumulate thereon by rains or snow falling on its surface, or flowing on it from the surface of adjoining lots, either to stand in unusual quantities on the adjacent lands or to pass on to and over it in greater quantities and in other directions than they were accustomed to flow. *Cujus est solum ejus est usque ad coelum* is regarded as a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon, and beneath the surface, cannot be interfered with or restrained by any consideration of injury to the other land, which may be occasioned by the flow of mere surface water, in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water, by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course, after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil." In a note to the case of *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163, 21 L. R. Ann. ²⁴⁷ 593, the rule of the common law is thus stated: "The gist of the so-called common-law rule is, that one may do as he pleases with his property, regardless of the effect upon surface water. This rule recognizes the right of each proprietor to fight surface water: *Jones v. Hannovan*, 55 Mo. 462. And the result is that, if carried to its ultimate conclusion, it simply means that the courts will recognize no wrong in any action undertaken for the purpose of getting rid of surface water. In other words, no legal right of any kind can be claimed, *jure naturae*, in the flow of surface water, so that neither its detention, diversion, nor repulsion is an actionable injury, even though damage ensue: *Bowlsby v. Spear*, 31 N. J. L. 351, 86 Am. Dec. 216." The only exception to the rule that, surface water being a common enemy, every landowner has the right to deal with it in any such manner as he

may see fit, is that it is subject to the general law in regard to nuisances, if its accumulation has become a nuisance per se, as, for example, whenever it has become dangerous at all times and under all circumstances to life, health, or property. If this was not the law, a person could accumulate the surface water upon his premises in a populous town or city, and, although the nauseous gases and vapors escaping from it might be deadly to the public generally, it could not be abated even by the public authorities. The allegations of the complaint are not sufficient to show that the alleged accumulation of the surface water was a nuisance per se. It might seem, without explanation, that the case of *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472, 39 Am. St. Rep. 746, is in conflict with the foregoing authorities. In that case the court said: "The circuit judge, in effect, charged the jury that the first question for them to determine was, whether the construction of the sand bank was necessary for the protection of defendant's roadbed and right of way; and if so, then the defendant was not liable. . . . But in view of the express declaration of the law-making power, as embodied in section 2738 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute, or even authoritative ²⁴⁸ decision to the contrary, that the common-law rule must still be recognized as controlling here; for that section expressly declares that: 'Every part of the common law of England not altered by this act nor inconsistent with the constitution of this state, and the customs and laws thereof, is hereby continued in full force and virtue within this state, in the same manner as before the passage of this act.' Under the common-law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if, in doing so, he throws it back upon a coterminous proprietor to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action." From the foregoing language used in that case it appears: 1. That the common-law rule was distinctly recognized as controlling in this state; and 2. That as the plaintiff lost the case, there was no error of which she could complain, as the charge was really too favorable to her. Under the charge of the presiding judge, she received the benefit of the intermediate or modified rule hereinbefore mentioned. If the defendant had lost the case and had appealed from the charge of the presiding judge, the court would have

been compelled, following the rule of the common law, to grant a new trial. It will thus be seen that the case of *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472, 39 Am. St. Rep. 746, is not in conflict with the common-law rule.

But even if the alleged accumulation of the surface water was such as to create a nuisance not *malum in se*, the next question which will be considered is, whether it was public or private in its character. In 16 *American and English Encyclopedia of Law*, 926, it is said: "Public or common nuisances affect the community at large or some considerable portion of it, such as the inhabitants of a town. . . . A private nuisance affects only one person or a determinate number of persons." In the note on that page, the following quotation from Wood's *Law of Nuisances* is made, to wit: "It is not so much a question whether a large number of persons happen ²⁴⁹ to be annoyed by the act, as whether the act itself was such and in such a place, as that the natural effect thereof would be to annoy or offend all who came within its sphere." In the same note the case of *Soltan v. De Held*, 2 Sim., N. S., 133, is cited, in which the vice-chancellor says: "To constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance, an injury, or a damage to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than it is to others." On the next page of the same volume it is said: "A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence; for if the act or use of property be in a remote and unfrequented locality, it will not, unless *malum in se*, be a public nuisance." On page 931 of the same volume it is said: "In order to constitute a public nuisance, the act or use of property must be an annoyance common to the public generally. The test is not the number of persons annoyed, but the possibility of annoyance to the public by invasion of its rights"; and in a note on same page, the case of *Soltan v. De Held*, 2 Sim., N. S., 133, is again cited, as holding that: "The test is not the number of persons annoyed, but the fact that it is in a public place and annoying to all who come within its sphere." The complaint alleges that the plaintiff's lot, upon which is his dwelling, is in the corporate limits of the town of Wagener, and within one hundred feet of defendant's line of railroad; and there is nothing in the complaint showing that the other inhabitants of the town of Wagener are not as

susceptible to the injurious effects of the alleged nuisance as the plaintiff. Under these circumstances, and tested by the foregoing authorities, the alleged nuisance could only be regarded as public in its nature; and having reached this conclusion, the next question that will be determined is, whether the allegations of the complaint show that the plaintiff sustained damage peculiar to himself. The rule upon this subject is stated in *Steamboat Co. v. Railroad Co.*, 30 S. C. 539, 14 Am. St. Rep. 923, affirmed ²⁵⁰ in *South Carolina Steamboat Co. v. Wilmington etc. R. R. Co.*, 46 S. C. 327, 57 Am. St. Rep. 688, as follows: "That the injury must be particular—as some of the cases express it, 'special or peculiar'—must result directly from the obstruction, and not as a secondary consequence thereof, and must differ in kind and not merely in degree or extent from that which the general public sustains." The plaintiff relies upon the allegations contained in the fourth paragraph of his complaint to show that his injury was special or peculiar. One of the requirements of the rule is, that the damages must differ in kind, as well as degree, from those which, it may be reasonably expected, will be sustained by the public generally. The allegations of the complaint show that the causes which led to the plaintiff's injury might reasonably be expected to affect others in the neighborhood, and, therefore, his injury was not special. The appellant's attorneys cited sections 1264 and 1272 of the Revised Statutes, which are as follows:

"Sec. 1264. No person shall be permitted or allowed to make or keep up any dams or banks to stop the course of any waters, so as to overflow the lands of another person, without the consent of such person first had and obtained; nor shall any person be permitted or allowed to let off any reserved water to injure the crops upon the grounds of other persons."

"Sec. 1272. Nothing contained herein shall be construed to authorize any person or persons to keep water at any time on lands other than his, her, or their own." There are no allegations in the complaint showing that these sections have any application to this case.

The respondent's attorneys gave notice of additional grounds upon which they would ask that the judgment of the circuit court be sustained, but the conclusions hereinbefore stated render the consideration of the additional grounds unnecessary.

It is the judgment of this court that the judgment of the circuit court be affirmed.

NUISANCE—PUBLIC—STAGNANT WATER.—One should not do anything upon his own soil which amounts to a nuisance or works injury to a neighbor. Thus, a city is answerable in damages for creating an offensive or unwholesome pond of water in the neighborhood of a lot owner's dwelling: *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392. To cause a whole neighborhood to become sickly, by erecting a dam across a stream, thus causing the water to stagnate and corrupt the air, or to produce smells and stenches without causing sickness, is a public nuisance: *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737; *Neal v. Henry*, Meigs, 17, 33 Am. Dec. 125.

NUISANCE—PUBLIC—ABATEMENT BY PRIVATE PERSON. Public nuisances can be abated by a private person only when they obstruct his private right, or interfere at the time with his enjoyment of a right common to many: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; note to *Jackson v. Kell*, 16 Am. St. Rep. 209; *Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794.

NUISANCE—PUBLIC—DAMAGES—ACTION FOR.—One who sustains, by reason of a public nuisance, a special damage different from that which is common to all may maintain an action for such damage, though there are many other persons injured to the same extent as himself: *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; note to *Taylor v. Portsmouth etc. St. Ry. Co.*, 64 Am. St. Rep. 221. Before a private person can sustain an action for a public nuisance he must show that the damage suffered by him differs from that suffered by the public in kind as well as degree: Note to *Knowles v. Pennsylvania R. R. Co.*, 52 Am. St. Rep. 865. This constitutes "special" damage: Note to *Taylor v. Portsmouth etc. St. Ry. Co.*, 64 Am. St. Rep. 221. Interference with a common right does not of itself afford a cause of action by an individual, but special or particular damage consequent on the interference does: Note to *Morris v. Graham*, 58 Am. St. Rep. 36.

McGAHAN v. LOCKETT.

[54 SOUTH CAROLINA, 364.]

NEGOTIABLE INSTRUMENTS—COUNTERMANDING ORDERS OR DRAFTS FOR THE PAYMENT OF MONEY.—If one who has money in another's hands, subject to the former's order, makes a draft thereon, for value, in favor of a third person, he cannot, after presentment thereof to the drawee, although it has not been accepted in writing, countermand the payment of the order except for fraud, want of value, or similar grounds. The simple fact that the drawer has changed his mind is not enough to divert the fund from the holder of the draft.

Action by *McGahan & Co. v. Lockett, Vaughan & Co.* The plaintiffs and defendants, except *Griffin*, appealed from an order overruling a demurrer to the answer.

Smythe, Lee & Frost, for the appellants.

Bates & Simms, for the appellees.

³⁰⁴ POPE, J. There is a single question presented by this appeal—Was the circuit judge in error in overruling the demurrer of defendants to the answer of their codefendant, J. O. Griffin, because it failed to state facts sufficient to constitute a defense? To apprehend the contention, a brief recital of the facts set up in the pleadings will be necessary. The complaint sets forth, substantially, that one J. O. Griffin had a policy for \$2,400 on his stock of goods at Ulmer, South Carolina, which were destroyed by fire, and, being indebted to the firm of T. R. McGahan & Co. for \$724.77, he assigned such policy to said firm, upon the trust that the proceeds of said policy should be applied, first, to the payment of said sum of \$724.77, and the balance thereof should be held by said ³⁰⁵ McGahan & Co., subject to the order of said Griffin. That there remained in the hands of McGahan & Co. of said proceeds, after the payment of their debt, the sum of \$1,475.33. That the said J. O. Griffin drew orders in writing on said McGahan & Co., to be paid out of said proceeds of the insurance policy when collected, in favor of Lockett, Vaughan & Co., A. Ehrlich & Bro., M. Drake & Son, Edmund T. Brown Company, Brown-Evans Company, F. W. Wagener & Co., Drake-Inness-Green Shoe Company, and Marshall, Wescoat & Co. That these orders were each presented to McGahan & Co., but were not accepted by them in writing. That subsequent to making the aforesaid drafts or orders, and before McGahan & Co. had collected the proceeds of the fire insurance policy, the said J. O. Griffin countermanded the payment of said drafts, and notified McGahan & Co. not to pay the same. That the parties who held the aforesaid drafts drawn by J. O. Griffin on McGahan & Co. began action against said McGahan & Co. to collect their respective drafts drawn by J. O. Griffin. That McGahan & Co., as plaintiffs, now bring this action against said J. O. Griffin and all of the holders of drafts drawn by J. O. Griffin upon said McGahan & Co., as defendants, to restrain their action against said McGahan & Co., and that the defendants be required to interplead together concerning their respective claims to said \$1,475.23, and that some party be appointed to hold said fund pending such litigation. The answers of all the defendants, except Griffin, set up their claims as bona fide holders for value of their respective drafts. The defendant, J. O. Griffin, answered as follows: "1. That he admits the allegations set forth and contained in the complaint, but alleges that he is entitled to the said sum of \$1,475.23, and that the plaintiff should have

paid the same over to him when the same was demanded—the said orders or drafts having never been accepted, and having been countermanded before the said fund came into the hands of the plaintiffs” (McGahan & Co.). The following is a copy of the draft drawn by J. O. Griffin upon McGahan & Co. in favor of Lockett, ³⁶⁶ Vaughan & Co. (The other drafts are similar in form.)

“\$109.34.

Ulmer, S. C., January 23, 1897.

“Messrs. T. R. McGahan & Co., Charleston, S. C.

“Please pay to Messrs. Lockett, Vaughan & Co., of Winston, N. C., \$109.34, out of my insurance policy that is assigned to you:
J. O. GRIFFIN.”

Judge Buchanan, who heard the demurrer on the 28th of April, 1898, passed a short order, dismissing and overruling the demurrer without assigning any reasons therefor. No other questions are involved in this appeal except the appeal from said order overruling the demurrer.

The following are the grounds of appeal: “1. Because it is respectfully submitted that his honor erred in not holding that the drafts referred to in the pleadings were valid assignments of the fund in question, and could not have been recalled or countermanded by the defendant, J. O. Griffin, without good cause; which cause should have been alleged in the answer, so as to be duly proved in the case; 2. Because his honor erred in not sustaining the demurrer to the answer of J. O. Griffin in that such answer failed to show any right in said Griffin to countermand or recall the said drafts.”

We think the grounds of appeal are well taken. The principles set forth in the cases of *Fogarties v. State Bank*, 12 Rich. 518, 78 Am. Dec. 468, *Simmons v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, and *Knobeloch v. Germania etc. Bank*, 43 S. C. 242, are practically decisive of this question. When the respondent, J. O. Griffin, placed in the hands of McGahan & Co. this sum of \$1,475.23, to be paid out by them on his order, and he gave drafts to his codefendants upon said McGahan & Co. to be paid out of this fund of \$1,475.23, which was the proceeds in their hands of his insurance policy, it was beyond his power, except for fraud, or want of value, or similar grounds, to prevent the holders for value of his drafts recovering the same from McGahan & Co. It was just the same as if J. O. Griffin had deposited to his own credit the sum of \$1,475.23 in some bank, and had given his codefendants checks

upon said bank. As was said by Mr. Justice Johnson, ³⁰⁷ in the case of *Fogarties v. State Bank*, 12 Rich. 518, 78 Am. Dec. 468: "This case—*Weston v. Barker*, 12 Johns. 276, 7 Am. Dec. 319—stands upon a principle that, when fully understood and appreciated, is sufficient for the case before us; and it is this, that when one, in consideration of money to come into his hands, promises to disburse that money as he shall be ordered by him from whom he receives it, he thereby creates a contract negotiable in its very nature, which puts him in privity with whomsoever in the world he may be ordered to make payment to, so that the promise is, according to the law merchant, made to that person, and he is bound by his promise to pay him." The quotation from the opinion in the case of *Weston v. Barker*, 12 Johns. 276, 7 Am. Dec. 319, as found on page 529 of *Fogarties v. State Bank*, 12 Rich. 518, 78 Am. Dec. 468, is squarely to the same effect. The answer demurred to, because the facts alleged therein are not sufficient to constitute a defense, sets up no reason why J. O. Griffin denied any legal effect to the drafts drawn by him in favor of his codefendants on *McGahan & Co.*, to be paid out of the fund realized from his insurance policy, which he had assigned to said *McGahan & Co.*, except that such drafts had not been accepted in writing by said *McGahan & Co.* before he notified them not to pay. The drawer in his answer does not deny he drew the drafts for value, but, simply because he has changed his mind, the fund must not be paid to the holders of his drafts. The moment the holders of these drafts notified *McGahan & Co.* of their drafts, it was in law an appropriation by J. O. Griffin of so much of the money of his in the hands, or to come into the hands of *T. R. McGahan & Co.* as would be necessary to pay such drafts. The circuit judge was in error.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court, with directions to sustain said demurrer to the answer of J. O. Griffin.

ORDER ON THIRD PERSON FOR PAYMENT OF MONEY.— An order in writing, directing one person to pay money to a third person, is not a check, but a bill of exchange: *Note to Allen v. Leavens*, 46 Am. St. Rep. 616; *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522. A want of written acceptance does not affect the payee's right to money due under an order on a third person, but only the mode of enforcing it. With acceptance, he can sustain an action upon the order; but without it he must recover upon the original demand by force of assignment: *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522.

PEOPLE'S LOAN AND EXCHANGE BANK v. GARLINGTON.

[54 SOUTH CAROLINA, 418.]

JURISDICTION—QUESTION OF TITLE IN FORECLOSURE PROCEEDINGS—CONTINGENT REMAINDERMAN—LIFE TENANT.—In a foreclosure suit, brought by the mortgagee of a contingent remainderman, the court has jurisdiction to determine the question of title, where the life tenant, by his answer, asserts absolute title in himself, and denies that either the mortgagee or his mortgagor has any interest in the mortgaged premises.

MORTGAGES.—A CONTINGENT REMAINDER in real estate may be mortgaged.

MORTGAGES—PREMATURE FORECLOSURE AS TO LIFE TENANT.—Upon breach of the condition of a mortgage, by a contingent remainderman, there may be a foreclosure and sale of whatever interest the mortgagor has in the mortgaged premises, without waiting until the happening of the condition upon which the remainder would become vested. Hence, such a suit is not premature as to the life tenant in possession, especially where he denies the title of the mortgagee and mortgagor, and asserts it in himself.

ESTATES—CONTINGENT REMAINDERS—BAR OF, BY DEED OF FEOFFMENT WITH LIVERY OF SEISIN.—At common law, a tenant for life could not bar contingent remainders by a deed of feoffment, with livery of seisin, unless he held the legal title.

ESTATES—CONTINGENT REMAINDERS—WHEN NOT BARRED BY LIFE TENANT.—Contingent remainders, created by a will, are not barred or destroyed by a life tenant's deed of feoffment, with livery of seisin, where the legal title is in the executors, and not in the life tenant, or where the latter's power to so bar contingent remainders has been taken away by statute.

TRUSTS—DEVISE TO EXECUTORS FOR ANOTHER'S USE—LIFE TENANT—LEGAL TITLE—STATUTE OF USES.—When property is devised to executors for the use and benefit of the testator's son during the latter's life, the legal title remains in the executors, where duties are imposed upon them which render it absolutely necessary that the legal title should remain in them. It does not, therefore, pass to the tenant for life under the statute of uses because that statute does not apply to such a case.

ESTATES—CONTINGENT REMAINDERS—BARRING OF, BY LIFE TENANT—DEED OF FEOFFMENT WITH LIVERY OF SEISIN—CONSTITUTIONAL LAW.—A STATUTE which provides that contingent remainders shall not be barred by deed of feoffment with livery of seisin is not unconstitutional, on the ground that it impairs the obligation of a contract, or on the ground that it is forbidden, retroactive legislation.

CONSTITUTIONAL LAW—VESTED RIGHTS IN STATUTORY PRIVILEGES.—Even where a life tenant has the statutory right or privilege to bar contingent remainders by a deed of feoffment with livery of seisin, he may be deprived of it, by subsequent legislation, where he has never attempted to exercise it, without violating vested rights, for no citizen has a vested right in statutory privileges or exemptions.

CONSTITUTIONAL LAW—VESTED RIGHT TO DO A WRONG.—The doctrine that a life tenant may, by a deed of feoffment, with livery of seisin, bar contingent remainders, had its origin

under the feudal system, and is generally regarded as a means of doing a wrong to the contingent remainderman, and always defeats the intention of the testator where such remainders are created by will. Hence, it cannot be said that a life tenant, though authorized by statute to bar contingent remainders in this way, has any vested right to do a wrong to the contingent remainderman by defeating the expressly declared intention of a testator.

ESTATES—CONTINGENT REMAINDERS—BARRING OF, BY LIFE TENANT—WHAT STATUTE IS NOT RETROACTIVE. A statute which provides that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment, with livery of seisin," applies to every contingent remainder, whether created before or after the passing of the act. It plainly forbids such future action by a life tenant, and, when applied to a right or privilege existing before, but not exercised until after, its enactment, is not retroactive in its effect.

Foreclosure by the plaintiff bank against John D. Garlington, John G. Williams, and others. The circuit court held that the plaintiff had the right to foreclose and sell, and to have its debt paid out of the proceeds of sale. The defendant, Williams, appealed on exceptions raising questions which appear in the opinion.

W. J. Stribling and Ball & Simpkins, for the appellant.

N. B. Dial and Ferguson & Featherstone, for the appellee.

419 McIVER, C. J. This was an action for foreclosure of a mortgage executed by the defendant, John D. Garlington, upon his interest in a certain tract of land known as "Spring Grove." So far as this appeal is concerned, the only controversy is between the plaintiff and the defendant, John G. Williams, who, by his answer, "for a second defense, alleges that neither the plaintiff nor his alleged mortgagor has any title to or interest in Spring Grove," having alleged, in his first defense, "that he is the owner, and entitled to retain the possession of Spring Grove." A jury trial having been waived, the case was heard by his honor, Judge Benet, upon the testimony taken and reported by a referee, who rendered a decree which is set out in the "case," which should be incorporated in the report of this case. It will be sufficient, therefore, to state ⁴²⁰ here, that the circuit judge, by his decree, adjudged that the defendant, John D. Garlington, was entitled to an interest in the Spring Grove tract of land, as a contingent remainderman, under the will of the late John D. Williams, and that such interest could be sold under the mortgage sought to be foreclosed in these proceedings. Accordingly, judgment was rendered for the sale of the interest of the mortgagor, John D. Garlington, and that the proceeds

of such sale be applied to the payment of the amount due on the mortgage debt held by plaintiff, after first paying the costs and expenses of such sale and the cost of this action.

From this judgment the defendant, John G. Williams, alone, appeals upon the several exceptions set out in the record, which should be likewise incorporated in the report of this case. We do not propose to consider these exceptions seriatim, inasmuch as, according to our view, they raise but two general questions, viz.: 1. Whether the action was prematurely brought as against the appellant; 2. Whether the interest of John D. Garlington, as a contingent remainderman, in the Spring Grove tract of land, was barred or destroyed by the deed of feoffment, with livery of seisin, executed by the life tenant of said land. For a proper understanding of these questions, it will be well to state here that, under the established facts of this case, the Spring Grove tract of land, formerly belonging to one John D. Williams, who died on the — day of June, 1870, leaving a will, by the third clause of which he devised Spring Grove to his executors for the use and benefit of his son, the said John G. Williams, during his natural life, "to remain in his possession and enjoyment, unless efforts be made to subject the same to the payment of his debts and liabilities, and in this event to be taken charge of by my executors to prevent and protect the same from such liabilities, and at his death to be equally divided between such child or children as he may leave surviving at his death; or should all his children die before attaining the age of twenty-one years, then to revert to my estate for division, as the residue of my estate is hereafter ⁴²¹ directed." And by the eleventh clause of his will the testator devised the rest and residue of his estate as follows: one-fourth to certain trustees for the sole and separate use of his wife, and the remaining three-fourths to be equally divided between his two daughters, Phoebe and Lucy, and his grandson, the said John D. Garlington. There are other provisions in these two clauses of the will, which we do not deem it necessary to set out here, as they are not pertinent to the inquiry of this case. It is conceded, as we understand it, that, under these two clauses of the will, the mortgagor, John D. Garlington, was entitled to a contingent remainder; but whether conceded or not, it is clear that such would be the result, under the case of *Faber v. Police*, 10 S. C. 376. It also appears that the life tenant, John G. Williams, on the third day of December, 1892, with the avowed purpose to bar the contingent remainders created by the will, executed a

deed of feoffment, with livery of seisin, purporting to convey the absolute estate in fee in the Spring Grove tract to one James T. Bozeman, and that, on the same day, the said Bozeman reconveyed the same to the said John G. Williams. Both of these deeds were duly recorded. It seems, however, that, prior to this transaction, the mortgage which the plaintiff is seeking to foreclose was executed, to wit, on the 13th day of February, 1892. In the light of the foregoing facts, which are either conceded or established by the findings of the circuit judge, to which findings there is no exception—all the exceptions taken being to the legal points ruled by the circuit judge—we will proceed to the consideration of the first question above stated.

The appellant seems to contend that, because the contingencies upon which the estate in remainder would become vested have not yet happened and may never happen, the plaintiff has now no cause of action, as against the appellant, and, therefore, the complaint, as to him, should have been dismissed. In the first place, it does not appear that any motion was submitted to his honor, Judge Benet, or that the question which would be presented ⁴²² by such a motion was either considered or passed upon by him. It is stated in that portion of the "case" in which the testimony taken by the referee is set out that, at the close of the testimony on the part of the plaintiff, the "attorneys of John G. Williams enter a motion to dismiss the complaint," but upon what ground is not stated. Certainly, the referee had no power to consider or decide the question presented by the motion, as he was appointed simply to take the testimony, and he did not undertake to do so, and the circuit judge does not appear to have done so. He states, in the outset of his decree, that the appellant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action as to him, which demurrer was overruled; but as we gather from the argument here, the demurrer was overruled by his honor, Judge Aldrich, at a preceding term of the court, and not by Judge Benet. But waiving all this, in the interest of the appellant, we will not decline to consider the question on its merits. We do not think the question was concluded by the ruling on the demurrer, as that ruling was based solely upon the facts as alleged in the complaint, and there were no allegations in the complaint upon which the question, as now presented, could have been raised, as there was nothing in the complaint to show what was the nature or extent of the mortgagor's interest in the mortgaged premises, or the nature

and extent of the appellant's claim thereto. Now, however, it does appear that the interest of the mortgagor is that of a contingent remainderman, and the appellant claims that he is the owner of the mortgaged premises, and in his second defense he "alleges that neither the plaintiff nor his alleged mortgagor has any title to or interest in Spring Grove," the mortgaged premises. Now, if a contingent remainder in real estate can be the subject of mortgage, and if the mortgagor has such an interest in Spring Grove, we see no reason why the mortgagee, upon breach of the condition of the mortgage, may not proceed to foreclose the same and sell whatever interest the mortgagor may have in the mortgaged premises, without ⁴²³ waiting until the happening of the condition upon which the remainder would become vested. Especially is this so when the life tenant in possession has, by his answer, raised the issue whether the mortgagor has now any interest in the mortgaged premises. Of course, the sale of the interest of the contingent remainderman cannot, in any way, affect the rights of the life tenant; and that is carefully provided for in circuit decree. At such sale the purchaser will take only the interest of the mortgagor, whatever that may prove to be. In this case, the life tenant having by his answer denied that the mortgagor has any interest in the mortgaged premises, and alleged that he is the absolute owner of the same, the issue which he has thus presented must be determined. We do not think, therefore, that the action was prematurely brought as against John G. Williams, the life tenant in possession, who had by his deed of feoffment and by the conveyance from his feoffee, both of which were spread upon the records, asserted his claim to the land as an absolute owner in fee; and we do not think that the circuit court had full jurisdiction to hear and determine all the issues as to the rights of the parties presented by the pleadings. Exceptions 1, 2, 3 and 4 must, therefore, be overruled.

We do not understand that it is questioned that a contingent remainder in real estate can be the subject of mortgage; but, if questioned, the following authorities are quite sufficient to show that such an interest in real estate may be mortgaged: 2 Story's Equity Jurisprudence, sec. 1021; Allston v. Bank, 2 Hill Eq. 235; Roddy v. Elan, 12 Rich. Eq. 343; Gilkerson v. Conner, 24 S. C. 321; Rountree v. Rountree, 26 S. C. 471.

It only remains to consider the second question above stated, viz., whether the contingent remainders created by the will of John D. Williams in John D. Garlington and others were barred

or destroyed by the deed of feoffment, with livery of seisin, relied on for that purpose. The circuit judge held that the contingent remainders were not barred, for two reasons: 1. Because the ⁴²⁴ legal title to Spring Grove was in the executors, and not in the life tenant; 2. Because the power of a life tenant to bar contingent remainders by deed of feoffment, with livery of seisin, was taken away by the act of 1883 (18 Stats. 430). It seems to us that both of these reasons are sound. It is not and cannot be denied that, even at common law, a tenant for life could not bar contingent remainders by a deed of feoffment, with livery of seisin, unless he held the legal title. It will be observed that Spring Grove is not devised to John G. Williams, directly, for his life, but to the executors, "for his use and benefit during his life"—and, if this were all, there would be no doubt that the statute of uses would execute the use, and the legal title would pass to John G. Williams for his life. But this is not all, for the testator proceeds to say that the property is "to remain in his possession and enjoyment, unless efforts be made to subject the same to the payment of debts and liabilities; and in this event, to be taken charge of by the executors to prevent and protect the same from such liabilities." This rendered it absolutely necessary that the legal title should remain in the executors, in order that they might be enabled to carry out this provision of the will. For if the legal title passed into John G. Williams by virtue of the statute of uses, it would be impossible for the executors to take charge of the property and protect it from the claims of the creditors of John G. Williams: See *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654. But there is another reason why the legal title did not pass to the life tenant by virtue of the statute of uses. Under the eleventh clause of the will, the property known as Spring Grove would, in the event of the death of John G. Williams without leaving a child who should attain the age of twenty-one years, fall into the residue, and that the executors are directed to sell, which they could not do unless the legal title remained in them. It is therefore clear that there were duties imposed upon the executors, for the proper performance of which it was necessary that the legal title should remain in them. In such a case, ⁴²⁵ the rule is well settled that the statute of uses does not apply.

But the second and stronger reason why the deed of feoffment, with livery of seisin, could not bar the remainders, is that, very nearly nine years before the life tenant undertook to do so, the legislature, by the act of 1883 (Rev. Stats., 1977), above

referred to, expressly declared: "That no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment, with livery of seisin." The object of that act, as declared by its title, was "for better protection of contingent remainders," and its manifest purpose was to prevent the accomplishment of just such an object as appellant sought to accomplish by his deed of feoffment, with livery of seisin. It is contended, however, that this act cannot be applied to this case for two reasons: 1. Because such an application of it would render it unconstitutional; 2. Because it would give the act a retroactive effect. As to the first of these reasons, it is sufficient to say that we are not aware of any constitutional provision with which this act conflicts, and none such has been pointed out. Some allusion has been made in the argument to the provision in the constitution of this state, and as well to the constitution of the United States, forbidding the passage of any law impairing the obligation of any contract, but, as no matter of contract is involved in this case, it is impossible to conceive how the act of 1883 can be regarded as violative of these constitutional provisions. It certainly cannot be said that the effect given the act of 1883, by the circuit judge, would make it retrospective, and for that reason violative of the constitution, for there is nothing in the constitution which forbids retrospective legislation, unless it have the effect of impairing the obligation of a contract, or divesting vested rights of property: See *McLure v. Melton*, 24 S. C. 559, 58 Am. Rep. 272, and cases there cited. Indeed, we do not understand that appellant really relies upon the point that the act of 1883 would be unconstitutional if applied to this case.

We proceed, then, to consider the second reason why appellant ⁴²⁶ contends that this act of 1883 cannot be applied to the present case, viz., that so to apply it would give the act a retroactive effect, in violation of the well-settled rule that all acts must be construed to be prospective and not retrospective, except when a contrary intention is expressed, or necessarily implied, by the terms used in the act. In the first place, we do not consider that the act would be given a retroactive effect by applying its provisions to the present case. If the deed of feoffment had been executed prior to the passage of the act of 1883, we could then see how it would be regarded as giving the act of 1883 a retroactive effect, if the attempt should be made to apply it to a deed executed prior to its passage. But here the deed of feoffment was executed nearly nine years after the passage

of the act, and such deed can only be permitted to have such effect as the law in force at the time of its execution allowed it to have. Certainly, the legislature must be regarded as having the power to make such changes in the modes of conveying real property, whether acquired after or owned before the change is made, and declaring what shall be the effect of any given mode of conveyance; and while such changes in the law might not apply to conveyances made before, they certainly would apply to all conveyances made after such change in the law, and such legislation could, in no sense, be regarded as retrospective. It is contended, however, by appellant that when the testator, John D. Williams, died, and his will took effect, to wit, in 1870, the appellant acquired under the will a life estate in the Spring Grove land, with the right, under the law as it then stood, to bar the contingent remainders by a deed of feoffment, with livery of seisin, and that he could not be deprived of this right, which became vested in him in 1870, by any subsequent legislation. There is no doubt that under the common law of England, a tenant for life could bar contingent remainders by executing a deed of feoffment, with livery of seisin, and there is as little doubt that this portion of the common law became a part of the law of this state by virtue of the act of 1712, incorporated in the General ⁴²⁷ Statutes of 1882 as section 2738. This right, or privilege as it should be more properly termed, claimed by appellant is derived alone from the statute law of this state, and may, therefore, be withdrawn whenever the law-making power sees fit to do so—provided, always, that in so doing the constitution is not violated. A citizen cannot be said to have a vested right in statutory privileges or exemptions: Cooley's Constitutional Limitations, 2d ed., 383. Upon this principle it has been held in *Stoddard v. Owings*, 42 S. C. 92, that the legislature may change the periods prescribed by statute as a limitation to actions, as well in reference to antecedent as subsequent contracts. In that case, the following language used by the Massachusetts court, in *Bigelow v. Bemis*, 2 Allen, 496, is quoted with approval: "It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction upon the exercise of this power is, that the legislature cannot remove a bar which has already become complete, and that no new limitation shall be made to affect existing claims, without allowing a reasonable time for parties to bring actions before their claims are abso-

lutely barred by a new enactment." The case of *Gordon v. Blackman*, first reported in 1 Rich. Eq. 61, and again, upon a petition for rehearing, in 2 Rich. Eq. 43, 44 Am. Dec. 241, is very much like this case, in principle, and, as it seems to us, conclusive of this case. There the testator, who died in 1839, provided by his will that his executors, after a certain event happened, should transport all of his slaves "to the nearest non-slave-holding state in the United States, or to the free colony in Africa." Before this provision of the will was executed, the act of 1841 was passed, whereby it was declared that every bequest providing for the removal of any slaves without the limits of this state should be void. Held, that the act avoided this provision of the will, and that the executor must account to the next of kin of the testator for the slaves. Harper, C., in delivering the opinion of the court at the ⁴²⁸ last hearing, uses this language: "The act [of 1841] declares, in general terms, that every bequest directing slaves to be carried out of the state with a view to their emancipation shall be void. This, in plain and explicit terms, applies to every bequest, whether made before the passing of the act, or to be made subsequently." Again he says: "If the executor had actually sent the slaves out of the state, and the legislature had then passed an act declaring that he should be liable for their value, this would have been a retrospective act, or might have been called an act *ex post facto*. . . . The act of emancipation was to be in future, and the act of the legislature has intervened to forbid that future action. How, then, can it be regarded as retrospective, any more than if the testator himself had expressed an intention of liberating his slaves, and before his execution of that intention, an act of the legislature had forbidden it?" The principles laid down by this language are entirely applicable to the present case. The act of 1883 declares in general terms that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment, with livery of seisin." This, in plain and explicit terms, applies to every contingent remainder, whether created before or after the passing of the act. If the deed of feoffment had been executed, and the contingent remainder had thereby been barred, and the legislature had then passed an act declaring that the contingent remainder should not be thereby barred, such an act would, clearly, not only be a retrospective act, but would probably be regarded as void, as an attempt to divest vested rights of property. But here the contingent remainder

had not been barred at the time the act of 1883 was passed, and could only be barred by the future action of the life tenant, and the effect of the act was simply to forbid such future action, which was clearly within the competency of the legislature. Again, this doctrine that a life tenant may, by a deed of feoffment, with livery of seisin, bar contingent remainders, which had its origin under the feudal system, seems, very generally, to be regarded as a means of doing a wrong to the contingent 429 remainderman, and always defeats the intention of the testator where such remainders are created by will; and as is said in 20 Encyclopedia of Law, in a note on page 888 of the first edition, this power to do such wrong is strictissimi juris, and can never expect favor of anything beyond mere support; and a court of equity, viewing it in the light of a wrong, "seizes every occasion and makes every possible stretch for extending its protection against it." To use the language of Mr. Justice Goldsmith, in *Hoffman v. Hoffman*, 26 Ala. 544, quoted in a note on page 944 of volume 6 of the Encyclopedia of Law, second edition, which, though there applied to a different matter, is equally applicable here: "Whenever a statute is leveled against an abuse, or in furtherance of an acknowledged principle of right and justice, every reason exists for its most liberal application; and in such cases it may fairly be presumed that it was the intention of the legislature that the boon of the statute should be extended to every case which its words could properly include." In addition to this, the quotation from Endlich on the Interpretation of Statutes, section 281, in the decree of the circuit judge, shows that inchoate rights, depending for their existence upon the statute law, may, at the pleasure of the legislature, be abrogated or modified, where such rights have not been exercised at the time of the enactment. The same doctrine is held in the case of *Randall v. Kreiger*, 23 Wall. 137, cited by counsel for respondent in which case Mr. Justice Swayne, in delivering the opinion of the court, used this expressive and pertinent language: "There can be no vested right to do wrong." In this case the right of appellant to bar contingent remainders in the mode adopted by him for that purpose, under the law as it stood at the time the will took effect, cannot be regarded as anything more than a mere inchoate right which he had never attempted to exercise until after he had been deprived of such right by statute; nor can it be said that he had a vested right to do a wrong to the contingent remainderman by defeating the expressly

declared intention of the testator. ⁴³⁰ We are entirely satisfied, therefore, that, in no view of the case, can any of the exceptions be sustained.

The judgment of this court is that the judgment of the circuit court be affirmed.

ESTATE IN TRUST—TERMINATION OF—OPERATION OF STATUTE OF USES.—If an estate is conveyed to one for the use of, or in trust for, another, and no duty is imposed upon the trustee for the proper performance of which it is necessary that the legal estate should remain in him, it will pass at once to the cestui que trust by operation of the statute of uses, but if there is anything remaining for the trustee to do which renders it necessary that he should retain the legal title in order to fully perform the duty imposed by the trust, then the statute will not execute the use, and the legal estate will remain in the trustee: *Snelling v. Lamar*, 32 S. C. 72, 17 Am. St. Rep. 835.

CONTINGENT REMAINDERS—DEFEAT OF, BY DEED OF FEOFFMENT WITH LIVERY OF SEISIN.—That a contingent remainderman may alienate his remainder, and that a contingent remainder held under a devise may be defeated by a feoffment with livery of seisin from the tenant for life, see monographic note to *Snelling v. Lamar*, 17 Am. St. Rep. 840, on contingent remainders, how barred, defeated, or conveyed.

RETROSPECTIVE LAWS—VESTED RIGHTS.—There is no absolute constitutional prohibition of retrospective legislation in most of the states, but there are cases where legislation of this character is opposed to certain fundamental constitutional principles, as violating contracts, or as divesting rights already accrued. It is an admitted principle that vested rights cannot be destroyed or impaired, but what constitutes a vested right is a question of much difficulty, and the various cases that arise are mostly decisions specifying particular instances of vested rights: See monographic note to *Goshen v. Stonington*, 10 Am. Dec. 131-133, on retrospective laws, showing, at page 134, that there can be no vested right to do wrong, and that in the nature of things, there can be no vested right to violate a moral duty or to resist the performance of a moral obligation.

SALLEY v. MANCHESTER & AUGUSTA R. R. Co.

[54 SOUTH CAROLINA, 481.]

DOGS—PROPERTY IN—ACTION FOR INJURY OR LOSS. An owner of dogs has such a property in them as will support a civil action for their injury or loss, as where they are run over by the cars on a railroad track, and are injured or killed.

Actions by Salley and Zeigler against the defendant railroad company. The plaintiff in each case appealed from a judgment sustaining a demurrer.

Henry H. Brunson and Ilderton W. Bowman, for the appellants.

Moss & Lide, for the appellee.

⁴⁸² **JONES, J.** These actions were to recover damages for the negligent running over and killing of plaintiffs' dogs by the cars of the defendant company. The appeals are from an order sustaining a demurrer in each case, that the complaint did not state facts sufficient to constitute a cause of action, in that there is not such property in dogs that a railroad company is liable for killing upon its track. The only question presented is whether this ruling was error.

There is no doubt that by the common law one may have such property in a dog as the law will protect by a civil action. Blackstone said: "As to these animals, which do not serve for food and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny": 4 Blackstone's Commentaries, 235. Kent says: "Animals *ferae naturae*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, ⁴⁸³ without the animus revertendi, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner." In the case of *Sentell v. New Orleans etc. Ry. Co.*, 166 U. S. 698, the supreme court of the United States said: "By the common law, as well as by the law of most if not all of the states, dogs are so far recognized as property that an action will lie for their conversion or injury," citing cases. Whether dogs in this state may be the subject of such complete property as will make the stealing of them larceny, or whether dogs are within the words, "or other personal property," "the goods and chattels of another," in the statute punishing malicious mischief to certain animals, has not yet been expressly decided. As to larceny of a dog, see *State v. Wheeler*, 15 Rich. 362, and as to malicious mischief, see *State v. Trapp*, 14 Rich. 203. It is unnecessary to a decision of this case that we should now express an opinion on these matters, since a qualified property in dogs will support a civil action under the common law, and this principle is recognized as undisputed in both cases cited. The circuit

court's ruling was based on the case of *Wilson v. Wilmington etc. R. R. Co.*, 10 Rich. 52, but that case merely decides that the rule in *Danner v. South Carolina R. R. Co.*, 4 Rich. 329, 55 Am. Dec. 678, that a prima facie case of negligence is made out against a railroad company, where it is shown that cattle pasturing on uninclosed land are killed by the train of the company, does not apply where the animal killed is a dog. That case, it is clear, does not touch the question whether there is such property in dogs as will support a civil action for their injury or loss, but relates merely to the burden of proof on the question of negligence. In this case, the complaint alleged negligence, which the demurrer admits, hence the rule of evidence in establishing negligence in killing plaintiff's dog is not involved in this question. In this connection it may be also noted that the demurrer admits the allegation of plaintiff's ownership and possession of the ⁴⁸⁴ fox and deer hound of the value of seventy dollars at the time of the negligent killing thereof by defendant. So, under the pleadings, defendant's negligence has deprived plaintiff without his fault of a thing of value. Is it possible that in such case there is no redress? Section 1702 of the General Statutes recognizes ownership in dogs, by providing that the owner or custodian shall pay for sheep killed by his dogs; and in section 1701 any person is permitted to kill any dog in the act of worrying or destroying sheep, and for such killing there is no redress, civil or criminal; but the implication is, that there may be an unlawful killing of a dog, otherwise such legislation is absolutely useless. But the most potent fact in reference to the question whether in this state there is any statutory recognition of property in dogs is the fact that they are taxed by the state for revenue. Under the tax act, dogs must be assessed as personal property, according to their number and value. There is a practice of assessing each dog at five dollars as their value. Here, then, is legislative recognition of dogs as personal property, capable of valuation. What the law taxes as personal property it will protect as such. Without pursuing the subject farther, we cite the following cases in support of the conclusion of this court that there is such a species of property in dogs as will support a civil action for their injury or loss. The cases are so numerous and uniform in this direction that it is rare to find a discordant note. While in Georgia it was decided that an action would not lie against

a railroad for the mere negligent and unintentional killing of a dog (*Jemison v. Southwestern R. R. Co.*, 75 Ga. 444, 58 Am. Rep. 476), yet in *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323, it was held that the owner of a dog has such property in it as will enable him to maintain an action for trover for its recovery; and in *Wilcox v. State*, 101 Ga. 563, it was held that a dog is a domestic animal under a clause of the Georgia constitution like that in section 1, article 10, of our constitution, authorizing a tax "upon such domestic animals as from their nature and habits are destructive to other property." In Alabama, where it is held ⁴⁸⁵ that a dog is not such personal property as to make it the subject of larceny (*Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31), it is nevertheless a species of property for injury to which a civil action would lie: *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776. See, further, *Jenkins v. Ballantyne*, 8 Utah, 245; *Nehr v. State*, 35 Neb. 638; *St. Louis etc. Ry. v. Stanfield*, 63 Ark. 643, 37 L. R. Ann. 659, and note; *St. Louis etc. R. R. v. Hawks*, 78 Tex. 300; *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804; *Mayor etc. v. Meigs*, 1 McAr. 53, 29 Am. Rep. 578; *Mullaly v. People*, 86 N. Y. 365; quoted in note to *State v. Brown*, 40 Am. Rep. 81; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Harrington v. Miles*, ~~31~~ Kan. 480, 15 Am. Rep. 355; *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516; *Wheatly v. Harris*, 4 Sneed, 468, 70 Am. Dec. 259; *Heisrodt v. Hackett*, 34 Mich. 283, 22 Am. Rep. 529; *Ten Hopen v. Walker*, 96 Mich. 236, 35 Am. St. Rep. 598; *State v. Lymus*, 26 Ohio, 400, 20 Am. Rep. 772; which, while holding that a dog is not the subject of larceny, recognizes such right of property therein as is protected by civil remedies. To this list may also be added Indiana, Pennsylvania, and Massachusetts: *Kinsman v. State*, 77 Ind. 132; *Lentz v. Stroh*, 6 Serg. & R. 34; *Findlay v. Bear*, 8 Serg. & R. 571; *Cummings v. Perham*, 1 Met. 555.

The judgment of the circuit court is reversed and the case remanded for further proceedings.

DOGS—PROPERTY IN—ACTION FOR LOSS OF, OR INJURY TO.—The owner of a dog has such a property in the animal that he may recover in trespass for injuries done thereto: See monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 291, on property in dogs and the remedies for its enforcement. The owner of a dog has such property therein as will sustain an action for negligently injuring and killing it: *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 68 Am. St. Rep. 754.

GENTRY v. LANNEAU.

[54 SOUTH CAROLINA, 514.]

FRAUDULENT CONVEYANCES—VOLUNTARY DEED—SUBSEQUENT CREDITORS.—A voluntary deed made by a debtor cannot be set aside at the instance of a subsequent creditor, who has notice, either actual or constructive, without some proof of actual, moral fraud.

FRAUDULENT CONVEYANCES—ATTACK ON VOLUNTARY DEED BY SUBSEQUENT CREDITOR—IRREBUTTABLE PRESUMPTION.—When a subsequent creditor, with notice, attacks a voluntary deed made by his debtor, there is no irrebuttable presumption of fraud arising from the fact of indebtedness at the time, and that the transfer was without consideration. The question of fraud must be determined from all the circumstances of the case.

Action by Samuel C. Gentry, suing for himself and other creditors of Charles H. Lanneau, against Charles H. Lanneau and others to set aside a conveyance of land. The plaintiff appealed from a judgment dismissing the complaint.

Shuman & Dean, for the appellant.

Wells, Ansel & Cothran, for the appellee.

515 JONES, J. In this action, a subsequent creditor seeks to set aside a voluntary deed by a debtor to his wife and son, which was duly recorded prior to the contraction of the debt. The general rule on this subject is thus stated in *Jackson v. Plyler*, 38 S. C. 498, 37 Am. St. Rep. 782, by Chief Justice McIver, speaking for the court: "While it is unquestionably true that the mere fact that a deed is without consideration—a voluntary deed—will not render it fraudulent as to subsequent creditors, especially when they have notice, yet if, in addition to its being voluntary, it was made with a view to future indebtedness, or attended with some circumstances of fraud other than what arises from its being voluntary, then it may be declared null and void for fraud, even at the instance of subsequent creditors. While, therefore, an existing creditor may assail a voluntary deed, even though executed without any evil intent or fraudulent ⁵¹⁶ purpose whatever, and even if the motive which prompted the act should be of the most praiseworthy character, yet a subsequent creditor is not permitted to do so without showing some actual moral fraud": *Walker v. Bollman*, 22 S. C. 529, and cases therein cited. In other words, when a subsequent creditor with notice attacks the voluntary

deed of his debtor, there is no irrebuttable presumption of fraud arising from the fact that the transfer is without consideration, and the fact of indebtedness at the time; but all the circumstances must be weighed by the court or jury trying the issue, for the purpose of ascertaining whether fraud, actual and positive, as distinguished from what is called "legal fraud," really existed at the time. The master, whose judgment was reversed by the circuit court, rested his conclusion that the deed was fraudulent in this case on this as one of his conclusions of law: "A voluntary conveyance by one insolvent, or largely indebted at the time, will be deemed fraudulent, and presumed to be made with intent to hinder, delay, or defraud creditors, and being void as to existing creditors, is void as to all the subsequent as well as prior."

It is thus manifest that the master overlooked the distinction between existing and subsequent creditors, and gave to the fact that the deed was without consideration, and the grantor insolvent, or largely indebted, the probative force such facts would have in case existing creditors were attacking the transfer. These certainly were facts to be considered in ascertaining the existence of actual fraud, but such facts do not raise a conclusive presumption of law that the transfer is fraudulent as to subsequent creditors. It is true that the evidence shows that the defendant, Lanneau, was largely indebted at the time of the transfer, but it also shows that he honestly believed he had abundant means to pay his debts, estimating his property outside of the premises conveyed to be worth over thirty thousand dollars more than his liabilities. His belief that his creditors were amply provided for by the remaining property was not unreasonable, ⁵¹⁷ for a banker, acquainted with his property and liabilities, regarded him solvent outside of the property conveyed. At the time of the transfer, September 23, 1891, he was operating a cottonmill, which he owned, and it is not disputed that he was then doing a prosperous business. This mill, which had been recently built, was comparatively new, and cost him fifty thousand dollars. Owing to the disastrous panic of 1893, he closed the mill in July of that year. The mill was sold in October, 1894, and such property having depreciated in value, it was sold for twenty-five thousand five hundred dollars. All of the debts existing at the time of the transfer have been settled, and no existing creditor is, therefore, complaining or interested in this controversy. The master did not find as a fact that Lanneau

made the conveyance with any actual intent to hinder, delay, or defraud his existing creditors, nor did he find as a fact that he intended to hinder, delay, and defraud his subsequent creditors by contracting future debts and avoiding their payment by means of the deed to his wife and son. And there was no exception taken to the failure of the master to so find. Without, therefore, going into any extended examination of the circumstances, we may assume that the plaintiff has failed to establish the existence of actual fraud. This being so, he has no standing in court, and it is wholly unnecessary to consider in detail the numerous grounds of appeal. We may say, however, that we concur with the circuit court, that the circumstances do not warrant an inference that the deed in question was executed with intent to defraud.

The judgment of the circuit court is affirmed.

FRAUDULENT CONVEYANCES—VOLUNTARY DEED—ATTACK BY SUBSEQUENT CREDITORS—BURDEN OF PROOF—PRESUMPTION.—Subsequent creditors can avoid a conveyance for fraud only upon proof of actual or express fraud against them: Note to First Nat. Bank v. Maxwell, 69 Am. St. Rep. 73. A voluntary conveyance is not fraudulent or void as against subsequent creditors, though the grantor was indebted at the time it was executed: Notes to Brundage v. Cheneworth, 63 Am. St. Rep. 388; Gilliland v. Jones, 55 Am. St. Rep. 216. To make it fraudulent, proof of actual or intentional fraud is required: Note to Brundage v. Cheneworth, 63 Am. St. Rep. 388. To avoid it, a subsequent creditor must assume the burden of proving an actual fraudulent intent on the part of the grantor to defraud some creditor: Note to Yeend v. Weeks, 53 Am. St. Rep. 64. The force of the presumption, arising from the fact of indebtedness at the time of the transfer, with reference to subsequent creditors is discussed in the monographic note to Hagerfan v. Buchanan, 14 Am. St. Rep. 750-754.

WILSON v. KEELS.

[54 SOUTH CAROLINA, 545.]

RECEIVERS—FOREIGN—COLLECTION OF ASSETS HERE BY SUIT—COMITY.—The courts of one state will, upon the principle of comity, permit the receiver of an insolvent corporation of another state to collect the assets of the concern by suit, in the former state, for general distribution among the creditors of the insolvent in both states, where such permission does not conflict with the policy of the state or infringe the interests of domestic creditors.

RECEIVER—FOREIGN—COLLECTION OF ASSETS HERE BY SUIT—ESTOPPEL AGAINST RESIDENT CREDITOR.—If creditors residing in one state voluntarily go into another and prove their claims against the estate of an insolvent in the latter state,

and accept dividends from its receiver, they are estopped from afterward objecting to a suit brought in the former state by such receiver to collect the assets of the insolvent in that state for general distribution among the creditors of both states.

CORPORATIONS—FOREIGN—CREDITORS—DOMESTIC AND FOREIGN—STATUTES—CONSTRUCTION OF.—The statute of South Carolina does not give to the creditors of an insolvent foreign corporation who reside in that state the right to appropriate to their claims corporate assets in that state, to the exclusion of citizens of other states, who are also creditors.

Creditors' bill, brought by the plaintiff, Wilson, in behalf of himself and all other creditors of the Bank of New Hanover, residing in the state of South Carolina. The bank and its receiver, Junius Davis, Mary Keels, and William H. Ingram, master of Sumter county, were defendants. A receiver was prayed for to administer the assets in South Carolina. The circuit court dismissed the complaint on the ground stated in the opinion, and the plaintiffs appealed.

Purdy & Reynolds and Frasers & Cooper, for the appellants.

Lee & Moise, for the appellees.

551 JONES, J. The bank of New Hanover, a corporation created under the laws of North Carolina, having its principal place of business at Wilmington, being insolvent, on the 19th of June, 1893, made an assignment for benefit of creditors of all its property to the defendant, Davis, as assignee. Soon thereafter, under a creditor's bill, this assignment was set aside as void, and the defendant, Davis, was appointed receiver by the superior court for New Hanover county, in North Carolina. Then in July, 1893, in the suit of Tate, treasurer of the state of North Carolina, against the Bank of New Hanover, said Davis, as assignee under the assignment, and said Davis, as receiver under the creditor's bill, the superior court for Wake county, in said state, appointed the defendant, Davis, as receiver of all the assets and property of said bank, pursuant to a statute of that state which provides that whenever the state's bank examiner reports a bank as insolvent or in imminent danger of insolvency, the state treasurer shall file a bill for winding up the affairs of the bank, and administering its assets amongst all of its creditors, without any preference or priority. The plaintiff, as well as all other creditors 552 of the bank residing in South Carolina, appeared in the proceedings above mentioned, established their claims, and from time to time received their pro rata dividends from the bank assets distributed by said receiver. The greater part of the bank as-

sets from which these payments were made were situated in the state of North Carolina. Among the assets of the bank was the bond and real estate mortgage of Mary E. Keels, defendant, a citizen of this state, and this bond and mortgage went into the actual custody of the said Davis as receiver, who, as receiver, brought an action in the court of common pleas for Sumter county to foreclose said mortgage, and in February, 1897, obtained judgment of foreclosure thereon. But before sale of the land, plaintiff, for himself and all creditors of said bank in South Carolina, brought this action, claiming that he and the other creditors in this state were entitled to be paid out of the assets of said bank in this state before any part thereof is removed from the state, to the exclusion of the creditors not citizens of this state, and to this end prayed for a receiver here to administer the assets in this state. It appears that in April, 1897, Judge Buchanan made an order appointing D. M. Young as receiver in this state, and, among other things, ordered the master of Sumter county to proceed to sell the land under the said foreclosure proceedings, and to pay proceeds to D. M. Young, as receiver. These proceeds, two thousand two hundred and ninety-four dollars and twenty-seven cents, are now in the hands of Young, receiver. A number of creditors in this state have proved their claims before Young as receiver, but it appears that all these creditors, like plaintiff, Wilson, had established their claims under the proceedings in North Carolina, and had likewise received their pro rata of the funds disbursed there. Inasmuch as all the creditors of said bank in South Carolina are in like plight with the plaintiff, Wilson, no further reference to such creditors need be made. The circuit court, whose decree is officially reported herewith, sustained the contention of defendant, Davis, and dismissed the complaint herein, on the ground that plaintiff having established his claim in the cause pending in North 553 Carolina, and participated in the proceeds arising in said cause by receiving his pro rata of said funds, he thereby became a party to the cause of action in North Carolina, and he is now estopped to question the power or authority of the receiver so appointed.

We are satisfied that the plaintiff ought not to be permitted to interfere with the collection and disbursement of the proceeds of the bond and mortgage in question by the North Carolina receiver, both upon the ground that he is concluded as to the question of such receiver's right to collect such assets

of the bank by becoming a party to the proceedings in North Carolina, and upon the ground of judicial comity. The bond and mortgage were in the actual custody of Davis, receiver, by virtue of proceedings to which plaintiff was a party, and, as to plaintiff, it was the right and duty of the receiver to collect the same. The court of common pleas for Sumter county, in this state, had permitted the said North Carolina receiver to obtain judgment of foreclosure, and thus the bond and mortgage in actual custody of the North Carolina receiver were merged into a judgment in favor of the North Carolina receiver. Under this judgment the land has been sold, and the proceeds are in the custody of the court. Such proceeds should be paid over to the North Carolina receiver, unless it is made to appear that to do so would conflict with the policy of our laws or infringe the right of creditors in this state. In 20 Encyclopedia of Law, pages 65, 66, the rule as to foreign receivers is, we think, correctly stated in the following language: "The rule in this country is said to be that receivers appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions, and that courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers. But expressions of this character have been considered to go too far; and the correct and current doctrine appears to be that, under the principle of comity, the courts of one jurisdiction will recognize the authority and permit the exercise of the functions of a receiver appointed in another jurisdiction, ⁵⁵⁴ except in those cases where a court of the former jurisdiction finds that its own policy would be displaced or the rights of its own citizens invaded or impaired; and this seems to be especially true where such receiver is, by the terms of his appointment, to gather the assets wherever found. . . . Nor is the right to confer such authority to be questioned upon any theory that the receiver's power is limited to the property found within the state where he is appointed; for it is not necessary that the property should be within the jurisdiction of the court." See, also, same book, pages 241, 242, where it is stated that "citizens in the jurisdiction of the court appointing the receiver will not be aided by foreign courts in evading the effect of the appointment." Thus, if a creditor of the bank residing in North Carolina and within the jurisdiction of that court, were here seeking to prevent the North Carolina receiver from collecting and disbursing the fund in question according to appointment, he would not be aided by the courts of this state. A creditor, though

resident in this state, who has voluntarily submitted himself to the jurisdiction of the court appointing the foreign receiver, has no stronger claim to evade the effect of the appointment. To permit the fund in question to go into the hands of the foreign receiver in this case is not contrary to any established policy of our law, nor injurious to the rights of domestic creditors. As seen, all the creditors residing in this state have established their claims in North Carolina, and have been receiving dividends from the insolvent's assets there. The North Carolina receiver now represents them, and is seeking to realize this particular asset for their benefit as well as the other creditors of the bank. His claim, therefore, is not hostile to or adverse to their just rights. It appears that, under the law of North Carolina, the assets of the bank will be administered among all the creditors of the bank without preference or priority. But plaintiff asserts that under the act approved December 20, 1893 (21 Stats. 409), entitled, "An act to declare the terms on which foreign ⁵⁵⁵ corporations may carry on business and own property within the state of South Carolina," creditors of said bank resident in this state have an exclusive right to appropriate to their claims the assets of the bank in this state. This contention is based on section 6 of said act, which is as follows: "That it shall and may be lawful for any court of competent jurisdiction in this state to take possession of, wind up, administer, and marshal the assets in this state of any such foreign corporation (in like manner and in like cases as by law may be done with respect to corporations chartered under the laws of the state), for the protection of any and all citizens of this state who may be stockholders or creditors of such foreign corporation, as in the case of legatees and creditors (citizens of this state) of deceased persons whose domicile was at the time of their decease outside this state, in respect to assets within this state." We do not construe this act as attempting to give creditors residing in South Carolina the right to appropriate to their claims the assets of a foreign corporation in this state to the exclusion of citizens of other states who are also creditors. There is no doubt that it is the duty of the courts of this state to protect the interests and rights of domestic creditors concerning assets of a foreign corporation in this state, but there is a vast difference between protecting domestic creditors and sequestering to them exclusively assets which ought in justice and right be administered for the benefit of all creditors. If so construed as to ex-

clude nonresident citizens, who are creditors, from participating in the assets in this state of a foreign corporation, a grave question as to the constitutionality of the act might be raised: *Blake v. McClung*, 172 U. S. 239, wherein the supreme court of the United States recently decided that while a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute them or their proceeds among creditors according to their respective rights, yet it cannot, under article 4, section 2, of the constitution of the United States, deny the right of citizens of other ⁵⁵⁶ states to participate in such distribution on equal terms with its own citizens. Moreover, the act in question was passed after the foreign corporation involved here had ceased to do business, and whose property had already been placed in the hands of a receiver; hence such act is not applicable to this case. It thus appears that plaintiff and the creditors of the said bank in this state have, by their appearance in the jurisdiction of the court of the domicile receiver, already secured the right to participate in the equal distribution of the assets of the foreign corporation, all that they have a right to do. Thus, no interest of domestic creditors intervene to prevent the exercise of that comity which should induce the courts of this state to recognize the claim of the foreign receiver to collect for equal distribution the particular assets in question. Nor do we know of any established policy or statute in this state, which prevents the exercise of such comity.

The exceptions to the decree of the circuit court are overruled, and the judgment of that court is affirmed.

FOREIGN RECEIVERS—SUITS BY—COMITY—RIGHTS OF DOMESTIC CREDITORS.—A receiver may generally sue in the courts of another state. His power to do so, however, arises from comity merely, unless there is a special statute authorizing such a suit: *Note to Parker v. Stoughton Mill Co.*, 51 Am. St. Rep. 885; *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298. But a foreign receiver is not allowed to maintain a suit against the assets of an insolvent debtor, as against a resident creditor: *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917. And state comity does not require the courts of one state to permit receivers appointed by the court of another state to exercise privileges detrimental to the citizens of the former while pursuing appropriate legal remedies there: *Note to Grogan v. Egbert*, 67 Am. St. Rep. 768.

WILLIAMSON v. EASTERN BUILDING AND LOAN ASSN.

[54 SOUTH CAROLINA, 582.]

ATTACHMENT—MOTION TO DISSOLVE—DECISION AS TO CAUSE OF ACTION.—It is not error for a judge, upon a motion to dissolve an attachment, made at chambers upon affidavits, to determine whether the plaintiff has a cause of action, when it is necessary to do so.

BUILDING AND LOAN ASSOCIATIONS—REPUGNANCY BETWEEN AGREEMENT AND BY-LAWS—CONSTRUCTION OF CONTRACT.—If the certificates of stock and circulars of a building and loan association express a definite time at which its stock will mature, but the charter and by-laws at the expiration of such time show that the shares have not matured, thus creating a repugnancy, and irreconcilable conflict as to the time when the shares will mature, the certificates of stock and circulars must prevail, in a suit brought by a stockholder, who purchased with reference to them, to compel the association to pay for his shares.

BUILDING AND LOAN ASSOCIATIONS—MATURITY OF SHARES—CONFLICT AS TO TIME—ELECTION—PUBLIC POLICY.—In an action against a building and loan association, by one of its stockholders to compel it to pay for the plaintiff's shares, public policy, in order to prevent the perpetration of fraud, demands that the defendant should not be allowed to elect whether it will be bound by its by-laws, or its express agreement, as to the time when its shares will mature.

CONTRACTS—CONSTRUCTION—CIRCULAR OF BUILDING AND LOAN ASSOCIATION.—The construction of a written instrument is a question of law to be decided by the court. Hence, it has the right to construe a circular of a building and loan association upon the faith of which stock has been bought in the concern.

CONTRACTS—CONSTRUCTION—INTERPRETATION OF PARTIES.—When the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract by the parties themselves is entitled to great weight.

ATTACHMENT—MOTION TO DISSOLVE—CONSIDERATION OF MERITS.—On appeal from an order dissolving an attachment, questions involving the merits of the case will not be considered.

BUILDING AND LOAN ASSOCIATIONS—AGREEMENT ULTRA VIRES—TORT—RETENTION OF BENEFITS—CAUSE OF ACTION.—If an agreement fixing a definite time for the maturity of the shares of a building and loan association is ultra vires, and the association enters into it knowing that it cannot perform its part thereof, and thereby induces one to part with his money in the purchase of stock, it is a tort for which the association is answerable. So, if it derives and retains benefits from the purchaser, under such an agreement, he would have a cause of action therefor.

ATTACHMENT.—A DEBT is separate and distinct from the evidence of it. Hence, a debt, though secured by a note and mortgage, may be attached, even where the sheriff cannot reduce the securities to possession.

ATTACHMENT OF PROPERTY OF FOREIGN CORPORATIONS—CONSTRUCTION OF STATUTES.—The provisions of the South Carolina code, subjecting the property of foreign corporations to attachment, have not been repealed by the laws of that state, which impose conditions upon which foreign corporations are allowed to do business therein.

APPEAL.—QUESTION NOT PASSED UPON BELOW WILL NOT BE CONSIDERED on appeal.

Motion to dissolve an attachment in the case of Williamson v. Eastern Building and Loan Association, of Syracuse, New York. Williamson was a shareholder of the association, but, upon the maturity of the shares at the time stated in the certificate of stock and circulars issued by the association, the association refused to pay him the amount due on his shares, claiming that, under the charter and by-laws, the shares had not matured. Certain debts due the association were garnished. Three of the debts were evidenced by promissory notes, and two of them by bonds, while all were secured by mortgages on real estate. The lower court dissolved the attachment on the ground that the plaintiff had no existing cause of action when suit was commenced, as his claim was not then due and payable, and upon the further ground that the debts, being evidenced by notes and bonds, could not be attached for the reason that they were so evidenced. The plaintiff appealed.

Boyd & Brown, for the appellant.

T. H. Spain, for the appellee.

⁵⁸⁹ GARY, J. The appeal herein is from an order dissolving an attachment, which had been issued on the following affidavit: "Bright Williamson, the plaintiff above named, being duly sworn, says: 1. That the defendant above named, the Eastern Building and Loan Association, of Syracuse, New York, is a corporation duly organized and chartered under the laws of the state of New York, and that the said association is justly and truly indebted to the deponent in the sum of \$1,562.50, with interest from the 29th of December, 1897, as follows: on the — day of February, 1891, deponent having made application for membership in the Eastern Building and Loan Association, of Syracuse, New York, subscribed for and received twenty-five shares, under a contract by which he was to pay \$1 per share membership fee, and ⁵⁹⁰ thereafter seventy-five cents per share, or \$18.50 monthly for seventy-eight months, and upon his so doing the said association was to pay him \$100 for each share sixty days after acceptance of satisfactory proof

of such payments. That afterward, on the 19th of April, 1895, deponent, in accordance with the by-laws, borrowed from the association the sum of \$937.50, with the understanding and agreement that he would pay as interest the sum of \$6.25 each month until the expiration of the said seventy-eight months, when his said loan would be extinguished by deduction from \$2,500, the value of the shares. That deponent paid said membership fees, the aforesaid monthly dues on his stock, and the said monthly interest on his loan until the full expiration of the said seventy-eight months, and then withdrew from said association, gave notice to the association, furnished the satisfactory proofs of his compliance with his part of said contract, and made demand for the sum of \$1,562.50, the same being \$2,500 less \$937.50, the amount of his loan; but that, though sixty days have since elapsed, the said association has failed and refused to pay deponent the said sum of \$1,562.50. That deponent's said cause of action and its grounds will more fully appear by the sworn complaint in this action hereto annexed, all of the statements contained in which are true to the knowledge of deponent. 2. That the said association is a foreign corporation. 3. That deponent has commenced an action in this court by issuing the summons hereto annexed against the said association upon the said cause of action." (Jurat.)

These allegations are substantially the same as those set forth in the complaint except in the complaint it is alleged: "That by the said contract the time of maturity of the said shares was rendered definite, and the payment of the said \$100 per share upon the said monthly payments, being duly made, was fixed and contingent upon no circumstances. That this construction of the contract before plaintiff made said application for said shares and received the same was represented to plaintiff by said defendant through its agent ⁵⁹¹ and its literature, as its true and proper construction, and upon this representation, relying upon the same, and induced by the same, plaintiff signed the said application, received the said certificates, and made payments as required. That plaintiff paid the membership fees aforesaid, and, for the full term of seventy-eight months, paid to the defendant each month the sum of \$18.75." The plaintiff introduced in evidence a circular issued by the defendant which among other statements contained the following: "For the investor: This association issues three classes of certificates, designated as instalment, paid up, and fully paid up. All of

which are guaranteed to mature in six and one-half years; amply secured by first mortgage on real estate; paid up stock doubles in six and one-half years; fully paid up certificates guaranteed quarterly dividends, seven per cent per annum. For the borrower: This association has no auction sales, no bidding for loans, and a definite time for repaying a loan. The only association making a contract definite in every particular. Withdrawal value clearly stated, and never less than the amount paid in instalments; stock matures in seventy-eight months. Borrowers know the exact amount required to cancel their mortgage." The sheriff served a copy of the warrant on each of the debtors with notice designating the debt garnished; and each of the garnishees furnished the sheriff with a certificate admitting the indebtedness claimed, and setting forth its particulars. The other facts necessary to understand the issues raised are set out in the order of his honor, the circuit judge, which will be reported.

The plaintiff appealed upon exceptions, the first of which is as follows: "1. The circuit judge erred, it is respectfully submitted, in adjudging that appellant had no existing cause of action when suit was commenced, and in dissolving the attachment on that ground, inasmuch as such judgment was, in effect, a trial and determination of action on its merits, at chambers, on motion, and upon affidavits; was founded on mistakes and error in the ascertainment and construction of the contract between ⁵⁹² appellant and respondent, as presented in the affidavit and exhibits before him on the motion; took no notice of a distinct waiver by respondent of the conditions which his honor regarded as inhibiting action on the part of appellant; and was otherwise not sustained by the testimony before him, and the law applicable to the case." The first question raised by this exception is, whether there was error in determining upon motion, at chambers, and upon affidavits, that the plaintiff had an existing cause of action. Section 250 of the code provides that a warrant of attachment may be issued, whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is a foreign corporation. The rule is thus stated in 3 American and English Encyclopedia of Pleading and Practice, 79: "The merits of the cause cannot be questioned under an application to dissolve the attachment. The defendant may, however, advance pertinent facts to explain how the transaction, out of

which the suit originated, arose." In a note on that page it is said: "Thus an attachment, issued in an action to recover rent, has been held subject to discharge on motion which shows that the rent is not due and unpaid, as alleged in the affidavit, notwithstanding a claim by the plaintiff, that such a decision is really upon the merits: *Clark v. Montfort*, 37 Kan. 756. 'For,' said the court, in *Bundrem v. Denn*, 25 Kan. 430: 'While the court cannot inquire into the validity or justice of the cause of action, yet it may inquire into the truthfulness of the grounds of attachment set forth in the affidavit, and, if this inquiry incidentally refers to some of the allegations of the petition, this does not compel the court to refuse consideration of the motion, or suspend the decision until the final trial of the cause.' " It was necessary for the circuit judge to decide whether the plaintiff had a cause of action, and the appellant has failed to specify in what particulars his honor violated the rule in determining this question. We may say, however, that we do not understand that the circuit judge undertook to decide any questions of fact involving the ⁵⁹³ merits of the case; but that he reached his conclusion solely from a construction of the contract and the statute as to attachments.

We will next consider whether there was error in determining that the plaintiff did not have a cause of action on the ground that his claim was not due and payable. If this question had to be decided solely upon the plaintiff's affidavit, it would undoubtedly appear therefrom that a cause of action exists in favor of the plaintiff against the defendant. The defendant, however, introduced in evidence the charter and by-laws, for the purpose of showing that the shares of stock are far below the value of one hundred dollars, and, therefore, that the said shares have not matured. The agreement alleged in the plaintiff's affidavit and the by-laws present schemes for maturing the shares of stock that are radically different. The provisions of the said agreement and of the by-laws for maturing the shares of stock are repugnant and in irreconcilable conflict. The question is thus presented for this court to decide which shall prevail. In determining this question we will not consider any of the facts in the case that might estop either the plaintiff or the defendant from insisting upon the one or the other of said provisions, as this would involve the merits of the case, but will base our construction on what appears upon the face of the contract and the circular. It is a well-known fact that comparatively few people who become share-

holders in such associations are familiar with their by-laws. They rely upon the honesty, integrity and fair dealing of those who manage the affairs of the association. It is also a well-known fact that the by-laws are frequently intricate and almost unintelligible to the average shareholder, and that those in charge of the affairs of the association usually become exceedingly expert in the interpretation of them, thus giving the association a decided advantage in the way of information over the shareholders. Public policy, in order to prevent the perpetration of fraud and to prevent just such a case as we now have before us in which the ⁵⁹⁴ plaintiff alleges that he was induced by the express promises and the literature of the defendant to part with his money, in purchasing its shares of stock, demands that the defendant should not be allowed to elect whether it will be bound by its by-laws, or its express agreement, as to the time when the shares would mature. These views render unnecessary a consideration of the rule of interpretation discussed in the case of *Wisconsin etc. Ins. Co. Bank v. Wilkin*, 95 Wis. 111, 60 Am. St. Rep. 86, and in the extensive notes to that case, that when two clauses of a contract are in conflict, the first governs rather than the last. The circular will next receive consideration. The construction of a written instrument is a question of law to be decided by the court. This court has the right, therefore, to construe the circular. It unquestionably shows that the defendant interpreted the contract to mean that the shares would mature at a fixed and definite period. It is a well-settled principle that when the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract by the parties themselves is entitled to great weight: *Chicago v. Sheldon*, 9 Wall. 50; *Railroad Co. v. Trimble*, 10 Wall. 367; *Steinbach v. Stewart*, 11 Wall. 566; *Lowber v. Bangs*, 2 Wall. 728. Our conclusion as to the proper construction of the contract is in harmony with the interpretation placed upon it by the defendant, and this is an additional reason why the by-laws should not prevail against the express agreement fixing the time when the shares would mature.

The respondent also contends that even if the shares have matured, the appellant has not a cause of action, because there is no money in the treasury applicable to his claim. At the time the appellant became a shareholder, there was no by-law providing that shares should not be paid at maturity unless there was money in the treasury. The question whether the

appellant waived his right to insist upon the original contract, by becoming a borrower, involves the merits, and will not be decided in this proceeding.

⁵⁹⁵ It is also argued that the agreement fixing a definite time for the maturity of the shares was ultra vires. In the case of Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492, 60 Am. St. Rep. 172, it is correctly said by the court: "The general rule is, that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ultra vires." But even if the contract was ultra vires, what are the plaintiff's rights? In the case of Washington Gas Light Co. v. Lansden, 172 U. S. 534, the court says: "The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation, and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal, nor vote of the corporation constituting the agency or authorizing the act." In 7 American and English Encyclopedia of Law (second edition), 837, it is said: "To exempt the corporation from liability in any case, three requisites must concur. The act must be: 1. Within the authority conferred; 2. Without negligence; and 3. In good faith. If the corporation goes beyond or aside from the authority conferred upon it, it will be liable for resulting damage. And it will be equally liable if it fails to follow the mode and observe the essential formalities and restrictions as to time prescribed by the legislature, for the exercise of the powers conferred." In 27 American and English Encyclopedia of Law, 393, the law is thus stated: "It was at one time supposed that private corporations aggregate could not commit torts, and particularly those which involve the element of malicious intent; that as the sovereign, in granting rights and powers for lawful purposes, had conferred no power to commit unlawful acts, such acts committed by the corporation's ⁵⁹⁶ agents must, of necessity, be ultra vires the corporation, and the individual wrongs of the agents themselves. It is true that every tort committed by a corporation

involves an unauthorized exercise of corporate power, but this is no reason why the corporation should not be held responsible for the consequences. However this may be, the doctrine stated above is entirely obsolete, and to-day corporations are held liable to the same extent and under the same circumstances for the consequences of their wrongful act as natural persons." If the agreement was ultra vires, and the association entered into it knowing it could not perform its part thereof, and thereby induced the plaintiff to part with his money in the purchase of stock, then it was a tort, and the defendant would be liable therefor. Furthermore, even if the agreement was ultra vires and the defendant could interpose this plea, it would not be allowed to retain the benefits which it derived therefrom, and this would give the plaintiff a cause of action: *North Hudson etc. Assn. v. First Nat. Bank*, 79 Wis. 31. An interesting discussion of this subject will be found in the *Central Law Journal* of the 24th of March, 1899, in which numerous authorities are cited. The exception upon the question just considered is sustained.

The second exception is as follows: "2. The circuit judge erred in adjudging that the debts attached were not the subject of attachment in this state, because evidenced by notes and bonds, and were not attached, and in dissolving the attachment on that ground; it being respectfully submitted that under the statute law of this state and the construction thereof by our courts, such debts were and are subject to attachment, and that those in question in this action were duly attached." The circuit judge based his ruling upon the case of *Burrill v. Letson*, 2 Spear, 378. The law now of force is in some respects materially different from what it was when that case was decided. In *Tillinghast v. Boston etc. Co.*, 39 S. C. 497, the court says: "It must be remembered that an action cannot now, as formerly, be commenced by a writ of foreign attachment, but ⁵⁹⁷ that now, under the code, an attachment is merely a provisional remedy in aid of an action, and hence, to make it available, an action must be commenced in regular form": See, also, *Stevenson v. Dunlap*, 33 S. C. 350, and *Campbell v. Home Ins. Co.*, 1 S. C. 158. When the case of *Burrill v. Letson* was decided, the attachment act (3 Stats. 617), authorized the attaching of moneys, goods, chattels, debts, and books of account of an absent debtor, in the hands, power, or possession of anyone, while, under the present statute, the sheriff is required to attach "all the property" of the defendant within the county. Section 253 of the

code is as follows: "The sheriff or constable to whom such warrant is directed and delivered shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank notes, except such real and personal estate as is exempt from attachment, levy, or sale by the constitution, and shall take into his custody all books of account, vouchers, and papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real estate." There are other sections providing for the manner of attaching the different kinds of personal property, and showing that the intention was that all personal property should be subject to attachment, except such as is exempt by the constitution. Section 445 of the code is as follows: "The words 'personal property,' as used in this Code of Procedure, include money, goods, chattels, things in action, and evidences of debt." It is not denied that if no bonds, notes, or mortgages had been given, the debts evidenced by them would be subject to attachment. The cases of *Nichols v. Briggs*, 18 S. C. 484, *Plyler v. Elliott*, 19 S. C. 257, and *Ballou v. Young*, 42 S. C. 170, show that the debt itself is something different from the note or mortgage, which are mere securities and evidences of the debt. In the case of *Nichols v. Briggs*, 18 S. C. 484, the court says: "It must be kept in mind that there is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds, personal, real, pledge, ⁵⁹⁸ mortgage, et cetera. The note given is only evidence of the debt and one of the means of collecting, and if there is a mortgage, that is only another security for the same debt." As the debt is separate and distinct from the evidence of it, and as it undoubtedly is "personal property," it necessarily follows that it is the subject of attachment, although it may be evidenced by securities which the sheriff cannot reduce to possession. The case of *Campbell v. Home Ins. Co.*, 1 S. C. 158, supports this view. This exception is sustained. The third exception is too general for consideration.

The respondent gave notice that it would ask this court, if necessary, to sustain the order of the circuit judge on the following ground: "That the property of the defendant cannot be attached as that of a foreign corporation, as it appears from the complaint and affidavit that the defendant is located in this state, doing business therein, and under its laws, and that the court could acquire jurisdiction of the defendant by serving process on its resident agent therein named, and the circuit

judge erred in not so holding." It is contended by the respondent that by implication the laws imposing conditions upon which foreign corporations are allowed to do business in this state repealed the provisions of the code which subjected the property of foreign corporations to attachment. The laws imposing these conditions will be found in chapter 45 of the Revised Statutes, and in the acts of 1897 (22 Stats., p. 484). The provisions of the code relative to attachments are set forth in chapter 4 of the code. After the provisions of chapter 45 of the Revised Statutes were enacted, the legislature passed an act amending sections 248 and 250 of the code, and in said act provided how said sections should read as amended: Acts of 1897, 22 Stats., p. 450. The retention of the provisions as to attachments against foreign corporations shows conclusively that the legislature did not intend to repeal them. This conclusion is sustained by the case of *Savage v. People's etc. Assn.*, 45 W. Va. 275.

Respondent, in his argument, contended that the attachment ⁵⁰⁰ act was in violation of article 14, section 1, of the constitution of the United States, prohibiting a state from denying to any person the equal protection of the laws. The case of *Blake v. McClung*, 172 U. S. 239, shows that this would be a very interesting question if it had been passed upon by the circuit judge; but, as he had made no ruling upon it, the question will not be considered by the court.

It is the judgment of this court that the order of the circuit judge be reversed.

ATTACHMENT—CAUSE OF ACTION.—To charge a garnishee as a debtor of a defendant, it must appear, affirmatively, that at the time of the garnishment the defendant had a cause of action against him, for the recovery of a legal debt due or to become due by the efflux of time: See monographic note to *Hubbard v. Williams*, 55 Am. Dec. 68, on garnishment of money due on negotiable instruments.

CONTRACTS — CONSTRUCTION — INTERPRETATION OF PARTIES.—Ordinarily, a written contract must be construed by the court: See monographic note to *Wisconsin Marine etc. Bank v. Wilkin*, 60 Am. St. Rep. 93, showing which of repugnant clauses in a contract shall prevail; *Leaphart v. Commercial Bank*, 45 S. C. 563, 55 Am. St. Rep. 800. Several instruments concerning the same transaction may, under some circumstances, be construed as one contract, especially where one refers to the other, and the rule of construction, in a proper case, is the same as if only one instrument were considered: Note to *Wisconsin Marine etc. Bank v. Wilkin*, 60 Am. St. Rep. 96. The practical construction given to a contract by the parties to it will influence a court in construing it: Note to *Hall v. Chambersburg Woolen Co.*, 67 Am. St. Rep. 590.

BUILDING AND LOAN ASSOCIATIONS—STOCK FULLY PAID.—When the aggregate dues, with the credited earnings, equal in amount the par value of a share of stock, it is paid up, and the owner for that share ceases to be a stockholder, and his relation to the corporation becomes simply that of a creditor until he is paid: *Eversmann v. Schmitt*, 53 Ohio St. 174, 53 Am. St. Rep. 632.

CORPORATIONS—DEFENSE OF ULTRA VIRES.—When a corporation has enjoyed the benefits of a contract it cannot claim that it was ultra vires for the purpose of escaping its liabilities: *Notes to Linkauf v. Lombard*, 33 Am. St. Rep. 750; *Bedford Belt Ry. Co. v. McDonald*, 60 Am. St. Rep. 172; for the aggrieved party has a remedy in such a case: *Brunswick Gas Light Co. v. United etc. Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385.

ATTACHMENT—GARNISHMENT.—A DEBT EVIDENCED by a note payable to order may be attached, but the plaintiff, in order to recover judgment against the garnishee, must show that the defendant was still holder of the note: *Scott v. Hill*, 3 Mo. 88, 22 Am. Dec. 462. That debts due by negotiable paper may be attached, see the monographic note to *Hubbard v. Williams*, 55 Am. Dec. 70, on garnishment of money due on negotiable instruments.

GARNISHMENT.—FOREIGN CORPORATIONS which carry on business in a state, and have property and agents therein, may be garnished: *Note to Lathrop v. Clapp*, 100 Am. Dec. 510; *Folger v. Columbian etc. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Hannibal etc. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *note to Bowen v. Pope*, 8 Am. St. Rep. 332; but a foreign corporation must be located in a state, to give a court jurisdiction over it for the purpose of garnishment: *Note to Berry v. Davis*, 19 Am. St. Rep. 751. Compare *Colorado Iron Works v. Sierra etc. Min. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433.

APPEAL—QUESTIONS NOT PRESENTED TO TRIAL COURT. Cases will be reviewed by an appellate court only upon points and theories presented to the trial court: *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, and note showing that a question not raised at the trial will not be considered for the first time on appeal. See, also, *State v. Myers*, 70 Minn. 179, 68 Am. St. Rep. 521.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

BURGESS v. WESTERN UNION TELEGRAPH COMPANY.

[92 TEXAS, 125.]

INTERSTATE COMMERCE—TELEGRAPH COMPANIES. A state statute restricting contracts limiting the time in which suit may be brought, or providing for notice before suit is brought on contracts for the sending and delivery of telegraph messages, is not unconstitutional as an unlawful interference with interstate commerce, when applied to contracts for the transmission of interstate messages.

CONTRACTS—CONFLICT OF LAWS—PRESUMPTION.—In an action on a contract made in another state, the law of that state is presumed to be the same as that in which the action is brought.

**TELEGRAPH COMPANIES—CONFLICT OF LAWS—NEG-
LIGENCE.**—The statute of a state restricting contracts limiting the time in which suit may be brought, or providing for notice before suit is brought on contracts for the sending and delivery of telegrams, applies to and governs a suit to recover for negligent delay in the delivery of a telegram after its arrival in that state, although it is sent from another state.

CONTRACTS — UNREASONABLE STIPULATIONS.—The state legislature may, within just and reasonable bounds, declare certain stipulations in specified contracts unreasonable and void.

APPELLATE PRACTICE.—The court of civil appeals of Texas has power to review and set aside the findings of the trial court or jury upon the facts; and such action by that court is binding upon the supreme court, but such findings cannot be made the basis for the rendition of a judgment by the court of appeals.

Votaw, Chester & Martin, for the appellant.

N. G. Kittrell and M. R. Geer, for the appellee.

126 DENMAN, A. J. This suit was brought by Miss Sallie Burgess against the company to recover damages for its alleged

negligent ¹²⁷ delay in delivering to her uncle Hufham a telegram sent by her from New Orleans, Louisiana, to him at Beaumont, Texas. The company pleaded under oath "that the contract alleged to have been made with this defendant was made, if at all, on June 30, 1896, and that before bringing this action no notice was given within sixty days to this defendant of any claim for damages, as condition precedent to said suit, though said original contract, which was made in the state of Louisiana, required said notice to be given in not longer time than sixty days," and also a general denial. The cause having been tried before the court without a jury, and judgment having been rendered against it, the company appealed to the court of civil appeals, which court having reversed, and rendered judgment "that Sallie Burgess take nothing by the suit," she has brought the case to this court upon writ of error.

The first assignment of error is, that the court of civil appeals erred in holding that the stipulation in the contract pleaded in said special answer was valid. The stipulation was as follows: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." There was no proof that any attempt was made to give notice. The Revised Statutes, article 3379, provides that "no stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void." There being no proof in the record as to what the Louisiana law is on this subject, under the rule in this state we must presume that the statute is the same there as here: *Tempel v. Dodge*, 89 Tex. 71, and cases cited. Hence, the statute of Louisiana, where the contract was made, as well as that of Texas, where the company is alleged to have negligently delayed the delivery of the telegram, declares the stipulation void. We have held in the recent case of *Armstrong v. Railway* that this statute is not in violation of that clause of the constitution of the United States which empowers Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes": *Western Union Tel. Co. v. James*, 162 U. S. 650. In *Chicago etc. Ry. Co. v. Solan*, 169 U. S. 133, *Solan*, a shipper of cattle from Iowa to Illinois, while being transported under a drov-

er's contract which contained a stipulation "that the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of five hundred dollars," being injured in Iowa, was allowed to recover one thousand dollars, notwithstanding such stipulation, on the ground that the statute of Iowa did not permit the company to limit its common-law liability as a carrier of passengers by special contract. We apprehend that, under the clear reasoning of the court, the ruling must have been the same had the shipment been from Illinois to Iowa, the other facts being unchanged. ¹²⁸ If so, it seems to be direct authority for holding that under the Texas statute alone the stipulation requiring notice to be given in sixty days is void in so far as damages are claimed for negligent delay in the delivery of the message after it reached Beaumont.

Again, the statutes of Texas and Louisiana under consideration do not go as far as did the Iowa statute, in this, that the latter prohibited the making of any contract limiting the common-law liability of the carrier, while the former only strikes down such as are unreasonable on the question as to the time within which notice shall be given, and declares that any "stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void," thereby in effect determining that such a stipulation is within the meaning of the act unreasonable. We see no reason why the legislature of a state may not prohibit its courts from giving effect to unreasonable stipulations in contracts, nor why it may not go one step further, and, within just and reasonable bounds, declare certain stipulations unreasonable. It is to be presumed that the legislature, in enacting this statute, investigated and in good faith determined that by requiring the notice to be given within less than ninety days many just claims would be defeated, and that no legitimate rights of the party liable for the damages would probably be imperiled if he were required to so frame his contract as to allow at least ninety days for giving the notice. We cannot say that in so doing they have exceeded their power.

We are, therefore, of opinion that said assignment of error must be sustained, and that the court of civil appeals was not authorized upon that ground to reverse or render judgment.

The second assignment is, in effect, that the court of civil appeals "erred in its conclusion that the evidence in this case did not sustain the finding of the court that defendant was

guilty of negligence in failing to deliver the message, in that it is an invasion of the province of the trial court before which the evidence was produced orally, and the finding should be conclusive." This assignment cannot be sustained. The court of civil appeals has the power to review and set aside the finding of the trial court or jury upon the facts: *Choate v. San Antonio etc. Ry. Co.*, 91 Tex. 406.

The third and last assignment is, that the court of civil appeals erred in rendering the judgment. We are of opinion that this assignment is well taken, because: 1. As we have seen, the stipulation in the contract was not valid; and 2. While the court, as stated above, had the power to review the finding of the trial court upon the question of negligence and to find the fact differently, such finding by it could only be made the basis of a reversal and remanding, but not of a rendition, of judgment: *Choate v. San Antonio etc. Ry. Co.*, 91 Tex. 406. The court of civil appeals having, however, found as a fact that there was no negligence, such finding is binding upon this court in so far as it becomes our duty to review the judgment below, and necessitates a reversal of the judgment as a matter of law upon the assignment of the company complaining of the judgment. ¹²⁹ It is insisted, however, by the company, that under the rule announced in *Joske v. Irvine* we should render judgment on the ground that in legal contemplation there is not any evidence in the record from which a court or jury would be authorized to find negligence. In view of another trial we do not deem it proper to set out the circumstances in evidence in addition to those stated in the opinion of the court of civil appeals, from which we have concluded that we cannot so hold.

The judgment of the court of civil appeals is affirmed in so far as it reversed the judgment below and reversed in so far as it rendered judgment, and the cause is remanded.

Reversal of judgment affirmed. Rendition of judgment by court of civil appeals reversed and cause remanded.

INTERSTATE COMMERCE—TELEGRAPH COMPANIES.—See generally, on the regulation of telegraph companies by state legislation and the effect on interstate commerce, the monographic note to *People v. Wemple*, 27 Am. St. Rep. 559.

CONTRACTS—CONFLICT OF LAWS—PRESUMPTION.—If an action is brought in one state upon a contract made in another state, the court where the action is brought presumes the law of both states to be the same: *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 568, 49 Am. St. Rep. 898, and note.

CONFLICT OF LAWS—REMEDY.—Matters respecting the remedy such as bringing of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought: *Ruhe v. Buck*, 124 Mo. 178, 46 Am. St. Rep. 439, and extended note; note to *Heaton v. Eldridge*, 60 Am. St. Rep. 742.

WIGGINS v. BISSO.

[92 TEXAS, 219.]

PARTNERSHIP—ACCOUNTING—PLEADINGS.—In an action between partners for the recovery of the alleged profits of a business, an answer alleging that such partnership was formed for the purpose of procuring an unlawful contract out of which such profits arose is not subject to general demurrer, on the ground that from the pleading the contract appears to bear a date prior to that of the formation of the partnership.

PARTNERSHIP—ILLEGAL—ACTION FOR PROFITS—PLEADING.—In an action between partners for the recovery of the profits of a partnership business, an answer alleging the illegality of the partnership presents a defense.

CONTRACTS—ILLEGAL.—Courts cannot aid in the enforcement of contracts clearly illegal.

Stone & Lee and R. S. Neblett, for the appellant.

Simpkins & Mays, for the appellee.

220 BROWN, A. J. Peter Bisso sued the plaintiff in error in the district court of Navarro county, alleging, in substance, that on May 1, 1892, the plaintiff and the defendant entered into a partnership to continue one year from that date, under the style of William Wiggins, by which they agreed each to put into the partnership certain named property and services and to carry on in the city of Corsicana the sale of ice and beer. The petition alleged that all profits derived from the said business, amounting to seven thousand nine hundred and eighty dollars, were to be divided equally between the said partners, all of which went into the possession of the said William Wiggins, who likewise had possession of all the invoices of the beer and **221** ice shipped to and sold by the said firm, and of its books; that William Wiggins failed and refused to account to the plaintiff for any of the profits of the business; and prayed that an accounting might be had of the said partnership business and for judgment for one-half thereof.

The defendant below filed a general demurrer, a general denial, and a special answer, in substance as follows: That no such partnership ever existed between him and plaintiff as is

alleged in plaintiff's petition, but that on or about the twentieth day of April, A. D. 1892, plaintiff and defendant, by verbal agreement, entered into a partnership contract, by which it was mutually agreed that they should sell ice and beer in Corsicana, Texas, and, if it be true that the said partnership accumulated any profits in that business, such profits were accumulated under an illegal and unlawful undertaking by which the defendant entered into a contract in writing with the St. Louis Brewing Association, whereby the said partnership and the brewing association combined their skill, capital, and labor, and acts to create and carry out restrictions in trade, to increase the price of beer, and to prevent competition in transportation, sale, and purchase of beer, et cetera, making sufficient allegations to bring the contract between the partnership and the brewing association within the provisions of the anti-trust law of the state of Texas, approved March 30, 1889. The plaintiff demurred to this special answer and the trial court sustained the demurrer, whereupon the defendant, Wiggins, filed a trial amendment in which he reiterated, in substance, the allegations of the former plea, with the additional allegation that the partnership entered into between the plaintiff and himself was so formed for the express and sole purpose of obtaining, making, and carrying out the contract with the St. Louis Brewing Association, whereby the said partnership and the said brewing association agreed to do the things embraced in the said contract, and that the said partnership did carry on the business under the said illegal contract made with the brewing association, and that all the profits, if any, of the said business, were made out of the business carried on and conducted under and by virtue of the said illegal contract. The trial amendment referred to the contract with the brewing association, which was attached, dated on the fifth day of April, 1892. The plaintiff below filed a general demurrer to this trial amendment, which was sustained by the court. A trial of the case was had in the district court, which resulted in a verdict and judgment for the defendant in error, which was affirmed by the court of civil appeals.

For the defendant in error it is claimed that the allegations of the defendant's special plea show that the contract of partnership was not entered into for the purpose of securing the unlawful agreement for the sale of beer made between Wiggins and the brewing association, because it appears from the answer that the contract of partnership was made on the

twentieth day of April, 1892, and the agreement for the sale of beer, which is attached to the answer, bears date April 5, 1892, showing that the unlawful agreement had been entered into before the partnership was formed. It is distinctly alleged in the answer that the partnership was ²²² formed for the sole purpose of procuring the contract which was made between Wiggins and the brewing association, and that the said contract was actually made on behalf of the partnership, composed of Wiggins and Bisso, in the name of Wiggins alone by the agreement of the partners. In testing the sufficiency of this answer by general demurrer, it was the duty of the court to indulge in favor of the plea every reasonable intendment arising upon the pleading: *Wynne v. State Nat. Bank*, 82 Tex. 378, 383. There are many ways in which the discrepancy between the dates and allegations could be accounted for, and, although the plea may be somewhat uncertain, the positive allegations contained in it cannot be overthrown by the fact that the dates may conflict with the facts alleged. The allegations must be taken in this investigation as showing that the copartnership was formed for the purpose of procuring the unlawful agreement.

If the facts alleged by the defendant in his answer be true, Bisso and Wiggins entered into the partnership agreement for the purpose of violating the laws of the state of Texas by procuring a contract between themselves and the brewing association, which in its terms was a distinct violation of the anti-trust law of this state, approved March 30, 1889. The parties agreed to enter upon a business, the conduct of which involved daily violation and disregard of the laws of the state, out of which violation of the law the profit sued for accrued. Bisso cannot recover in this case without proving the contract of partnership between himself and Wiggins, and must recover, if at all, according to its terms. To give relief to Bisso, the court must examine each of the transactions which the partnership had with other people under the unlawful agreement, entered into with the brewing company, and thus the court would be engaged in the examination of the unlawful acts of these parties in order to do equity between them. Under the circumstances alleged in the answer, the courts of this state will not investigate such transactions, but will leave the parties as they find them: *Read v. Smith*, 60 Tex. 379; *Wills v. Abbey*, 27 Tex. 203; *Reed v. Brewer*, 90 Tex. 144; *Beer v. Landman*, 88 Tex. 450; *Bartle v. Nutt*, 4 Pet. 185; *Todd v.*

Rafferty, 30 N. J. Eq. 260; Gregory v. Wilson, 36 N. J. L. 315, 13 Am. Rep. 448.

In the case of Read v. Smith, 60 Tex. 379, which is directly in line with the case now before the court, Judge Stayton said: "It has been often said that the test whether a cause of action connected with an illegal transaction can be enforced at law is whether the plaintiff requires any aid from the illegal transaction to maintain his cause. While this is a correct rule, it may not go far enough to meet all the cases which may arise upon which, under well-settled principles, the courts would refuse relief upon the ground of the illegality of the transaction. The rule, however, goes far enough to include this case. The plaintiff claims the value of one-half of the scrip. Why? Because while sheriff he made the agreement set out, and in pursuance therewith furnished the money with which the paper was bought. Thus is he compelled to set out the agreement, illegal as it is shown to be by the answer, as the sole basis of his right. ²²³ The object and purpose of the contemplated partnership was to do indirectly through Wood, for the benefit of both, that which the law prohibited Smith to do directly, and it had no single purpose legal in its character. In such a case as is made by the pleading, we believe that the law forbids relief to either party in the way of forcing an account and settlement between them, they never having made a settlement themselves."

In this case, as in that, relief must be given by virtue of and in accordance with the partnership agreement, which was itself illegal. Bisso entered into this agreement in order to do directly in the name of Wiggins what the law forbade either of them to do in conjunction with another or with others. The facts of the two cases are so nearly identical that a proposition of law applicable to the one cannot be inapplicable to the other.

In the case of Read v. Brewer, 90 Tex. 144, the plaintiff sued to recover of the defendant upon a note given for furniture to be used by her in a house of prostitution. The court found that the person who sold the furniture knew that it would be used in maintaining that house, and intended by the sale to aid the woman in carrying on the immoral and unlawful business. Upon this state of facts this court held that the note upon which suit was brought was illegal and void and that the plaintiff could not recover. The reason given was, that the plaintiff could not recover except upon the void contract.

On behalf of the defendant in error, counsel cited many authorities, which we have examined, but find none that we think it necessary to comment upon except *Pfeuffer v. Maltby*, 54 Tex. 454, 38 Am. Rep. 631, *De Leon v. Trevino*, 49 Tex. 89, 30 Am. Rep. 101, and *Brooks v. Martin*, 2 Wall. 70. The first case mentioned involved the right of a partner to recover against his copartner for profits accruing in what was alleged to be an illegal partnership. The defendant alleged in substance that the partnership was formed for the purpose of furnishing tinware to the confederate states government in lieu of military services required of the partners by that government, and that the tinware not so used had been sold for confederate money, which had been invested by the defendant partner in cotton, shipped to Mexico, and sold for specie. Plaintiff demurred to this answer, which demurrer was overruled, and, upon trial, judgment was entered against the plaintiff. The case was referred to the commission of appeals; the opinion was written by Judge A. S. Walker and approved by the supreme court. Judge Walker states the question thus: "Whether the contract of partnership at the time it was formed and entered upon by the parties was illegal and void as against public policy is not necessarily the controlling question; but the true inquiry is whether a party to that contract is liable or not, in an action against him, brought by his former partner to recover from him his share of the proceeds of the partnership." The judge then proceeded to state what was decided in the case of *De Leon v. Trevino*, 49 Tex. 89, 30 Am. Rep. 101, and to quote largely from that case, principally what Judge Moore had himself quoted from the case of *Brooks v. Martin*, 2 Wall. 70; but ²²⁴ does not announce in that part of the opinion what application he made of the quotations from *De Leon v. Trevino*, 49 Tex. 89, 30 Am. Rep. 101, to the facts of the case before the court. He then proceeded to discuss a different question from that stated in the first part of the opinion, after which he concludes the opinion thus: "We rest our conclusion in the case before us, however, upon the question first discussed. It is not necessary to decide beyond the point which is there involved." We understand from the opinion that the judge intended to decide that, notwithstanding the contract of partnership might be illegal, the plaintiff could recover of the defendant under the facts of that case. He does not notice that the answer of the defendant alleged that the confederate money received in the course of the business had been invested in cotton and it sold for specie. There

can be no doubt that where parties have jointly, in the pursuit of an illegal purpose, acquired money and have invested that money in property which is in the possession of one of the joint owners, such possessor cannot resist the claim of the other on the ground of the illegality of the business in which the money was first acquired; it was not necessary for plaintiff to prove the partnership because the cotton was bought for the firm, not in the course of the unlawful business. That case was rightly disposed of, and the opinion, when applied to the facts, is not objectionable in the propositions that it lays down, but it wholly fails to sustain the plaintiff's contention in this case.

Brooks v. Martin, 2 Wall. 70, involved the right of a partner to recover from his copartners under the following state of facts: Martin, Brooks, and Field entered into a copartnership contract whereby Martin agreed to furnish the money and the other two agreed to transact the business of the partnership which was then formed for the purpose of buying the claims of soldiers for lands before warrants were issued. The purchase of such claims from soldiers was prohibited by an act of Congress, and the supreme court of the United States held the partnership to be illegal. Brooks and Field bought up a large number of claims from the soldiers as they passed through New Orleans on their return from Mexico to their homes in the United States, and Martin furnished the money to pay for them, amounting to about fifty thousand dollars. It was then agreed that Brooks should go to Washington City and secure the warrants, which he did, and that Field should go to the northwest and look for suitable locations. The claims bought from the soldiers were converted into warrants issued by the government and regularly transferred to the firm, and by that firm had been sold and converted into money or located upon land and the title procured. Some of the land had been sold for cash, and some had been sold upon time with mortgages to secure purchase money. Martin failed in business, and, knowing nothing of the condition of the partnership business in the lands, met Brooks, who represented to him that the business was in a very bad condition, and purchased Martin's interest for about three thousand dollars. Martin sued to set aside his conveyance of his interest in the assets of the firm and to recover what was properly due to him, to which suit Brooks pleaded the illegality of the partnership by which the ²²⁵ purchase of the original claims of the soldiers was made. The supreme court of the United States, speaking by Justice Miller, said: "When

the bill in the present case was filed, all the claims of the soldiers thus illegally purchased by the partnership with money advanced by the complainant had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large portion of the lands so located had also been held, and the money paid for some of it and notes and mortgages given for the remainder. There were then in the hands of defendants lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds and a division of these proceeds that the bill is filed. Does it lie in the mouth of the partner who has by fraudulent means obtained possession and control of all these funds to refuse to do equity to his other partners because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partners, or what rule of public morals will be weakened by compelling him to do so? The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts and cannot be affected by any action of the court in this case." The conclusion of the court in the above-cited case is not expressed in definite terms, but, taking into consideration the facts stated as the premises from which to draw the conclusion, it could rest upon no other ground than that the funds derived from the transactions, which were illegal, had been realized and invested in other property, for which one of the partners could maintain an action against his copartners without resorting to the terms of the illegal partnership. Any other view of the case would place it in direct conflict with the decision made by the same court in *Bartle v. Nutt*, 4 Pet. 185. We do not think that *Martin v. Brooks*, 2 Wall. 70, sustains the contention of the defendant in error in this case.

In the case of *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101, the plaintiff sued to recover of the defendant upon notes executed by the latter, to which the defense was interposed that the notes sued upon were given in settlement of the transactions of the partnership, which was formed for an illegal purpose.

Judge Moore, for the court, delivered an opinion in which the case of *Martin v. Brooks*, 2 Wall. 70, was carefully reviewed, and announced the conclusion that although the claim for which the note was given could not have been enforced if the partnership was illegal, yet, when the parties made a settlement of the illegal transactions among themselves and executed notes, the illegal character of the transaction did not attach to the notes and the defense set up could not prevail.

226 The answer of the defendant Wiggins, as amended by the trial amendment, alleged facts which, if true, would constitute a good defense to the plaintiff's action for an accounting of the affairs of the partnership between the plaintiff and the defendant; the district court erred in sustaining the demurrer to the answer, and the court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed and this case be remanded for further trial.

Reversed and remanded.

PARTNERSHIP—ILLEGALITY—ACCOUNTING.—While a partnership cannot be formed for an illegal purpose or one contrary to public policy: *Jackson v. Brick Assn.*, 53 Ohio St. 303, 53 Am. St. Rep. 638; yet under certain circumstances it has been held, even in Texas, that when an illegal partnership enterprise has been completed, one partner cannot refuse to account to the other for the profits on the ground of the illegality of the partnership objects: *Pfeuffer v. Maltby*, 54 Tex. 454, 38 Am. Rep. 631; *Crescent Ins. Co. v. Bear*, 23 Fla. 50, 11 Am. St. Rep. 331.

CONTRACTS—ILLEGAL.—Courts of justice will not enforce the execution of an illegal contract, nor aid in the division of the profits of an illegal transaction between associates: *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459; *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 55 Am. St. Rep. 763.

BRANCH v. INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

[92 TEXAS, 288.]

MASTER AND SERVANT—ACTS BEYOND SCOPE OF EMPLOYMENT.—If a railroad company intrusts the care of its handcar to its section foreman, it does not thereby become liable for an injury to a person at a public crossing, caused by collision with such handcar through the negligence of such foreman while operating the car upon his private business, not in the line of the operation of the railroad, nor in the performance of a duty to the company, and in violation of its orders.

F. J. Maier, for the appellant.

S. R. Fisher, for the appellee.

200 DENMAN, A. J. The court of civil appeals have certified to this court statement and questions as follows:

"This is an action by the appellant, John Branch, against the railway company to recover damages on account of injuries sustained by his wife in a collision with a handcar, operated upon appellant's road at a public crossing in the town of New Braunfels, Comal county, Texas.

"It is averred that the railway company intrusted the use and possession of the handcar to a foreman who was careless and untrustworthy, which fact was known to the defendant, and that it was a part of the duty of the foreman to carefully keep control and possession of said handcar, and that he negligently permitted the same to go upon the track in the night-time, and that he carelessly and negligently, in the operation of said handcar, caused it to collide with the plaintiff's buggy in which he and his wife were crossing the track at a public crossing.

"The facts in the record show that the handcar in question was intrusted to the possession, care, and use of one John Maloney, who used **201** the handcar for the benefit of the company. He at the time was the foreman of a telegraph repair gang for the defendant company.

"At the time of the accident, which occurred at night at a public street crossing of the railway in the town of New Braunfels, Maloney was propelling and operating the handcar on the railway track under circumstances from which a jury might infer negligence upon his part in running down the buggy in which the plaintiff and his wife were crossing the track; and under circumstances under which a jury might also infer that the plaintiff and his wife were not guilty of contributory negligence.

"The weight of the evidence tends to show that at the time of the accident, when Maloney was so using the handcar, he was doing so contrary to the instruction of the railway company, and for his own private use and benefit, not at the time being engaged in the performance of any duty imposed upon him by the company.

"There are also facts in the record which have a tendency to show that Maloney was a negligent and untrustworthy servant, and that the railway company had knowledge of this fact, or could have obtained knowledge by the exercise of reasonable diligence, and retained Maloney in its employ.

"The court below, in the trial of the case, instructed the jury to return a verdict in favor of the defendant. This case has once been before this court, in which the trial court also instructed a verdict for the defendant, which, upon appeal, was reversed.

"In view of this fact and the importance of the questions raised in the case, we certify the questions propounded to the supreme court, and, in this connection, we desire to state that, owing to the fact that the supreme court has previously dismissed certificates, because questions involving the entire case were certified to that court, we take occasion to say that there is one important question reserved by this court which we do not certify and upon which we have concluded the court below erred, and for which reason we have concluded to reverse the judgment of the court below.

"With this preliminary statement, we certify that the above styled and numbered cause is now pending in the court of civil appeals for the third supreme judicial district, and that there arises from the record the following questions, which we certify to the supreme court of the state of Texas for answer:

"Question 1. In view of a rule of public policy, if there is any applicable, or in view of the duty that a railway company owes to the public in exercising caution in operating its cars over and across public crossings, are such companies relieved from responsibility for the negligent conduct of its servants in the operation of its cars, which may result in injury to one who is without fault in crossing a railway track at a public crossing, at a time when the servant has the control and management of the car and is in possession thereof by the consent of the company, but at the time of the accident the servant is using and propelling the car on the railway track for his own private use and benefit and was not at the ²⁹² time performing a service for his master, and so used the car against the instructions of the master?

"Question 2. When a car is intrusted to the management and control of a servant of the company, who is required to use the car on the tracks when performing his duty to the company, the use of which may be attended with danger at public crossings, and the servant operates the car on the track in his own private use and benefit and against the instructions of his master, is not this conduct, in part, the operation of the road, for which the master would be responsible if the servant was guilty of negligence to the injury of one at a public crossing?

"Question 3. Does the fact that the car was in the possession of the servant who was charged as a part of his duty with the management and control of the same make the company responsible for the negligence of the servant in operating the car upon the track at a time when the servant was not performing some duty for the master?"

We understand the first question, when read in the light of the preceding statement, to be in effect: the car being intrusted to Maloney by the company, to be kept and used by him in the performance of his duties as foreman of the telegraph repair gang, and he having on one occasion in question, contrary to the instructions of the company, taken the car out on the road, not in the performance of any of such duties but upon a private errand of his own, and negligently injured plaintiff's wife, is the company liable? Since the question assumes that Maloney was not at the time using the car in the discharge of his duties to the company, and did not have its consent to operate it on the track, it would seem that, upon principle and authority, the nonliability of the company is so well settled that it would serve no useful purpose to attempt to restate the principles upon which the decisions in similar cases have been based, and, therefore, in answering the first question in the negative, we content ourselves with referring to some of them: *International etc. Ry. Co. v. Cooper*, 88 Tex. 607; *Gulf etc. Ry. Co. v. Dawkins*, 77 Tex. 229; *Stephenson v. Southern Pac. Co.*, 93 Cal. 559, 27 Am. St. Rep. 223; *Cousins v. Hannibal etc. Ry. Co.*, 66 Mo. 572; *Robinson v. McNeill*, 18 Wash. 163.

We are of opinion that the second question must be answered in the negative. While the law imposes upon a railroad company the duty of operating its road, and requires it to exercise a certain degree of care in such operation to prevent injuring persons at public crossings, it does not estop it from showing that a particular act, not done in its service or by its consent, was not in fact a part of its operation of the road. Whether such act be done by one who, in other matters, is the servant of the company or by a mere stranger is wholly immaterial. Whether the company is permitted by law to authorize the operation of its road in whole or in part by another, and, if not, whether it would not be estopped upon principles of public policy from denying that the running of the car by Maloney upon the occasion in question was a part of its operation of the road, in case the pleadings and evidence show, as contended by appellant, that Maloney was accustomed to run the car over the track upon

private errands, and that the company knew, or by the use of reasonable ²⁹³ diligence could have known thereof, are questions upon which we express no opinion, as they are not included in those certified. For the same reason we express no opinion as to the effect upon defendant's liability of the fact of Maloney's untrustworthiness.

We are of opinion that the third question must be answered in the negative. The rule laid down in *Railway Co. v. Shields*, 47 Ohio St. 389, 21 Am. St. Rep. 840, so much relied upon in argument, to the effect that the law imposes upon the master the duty of "consummate care" in the custody of things which are dangerous within themselves, such as torpedoes, and that such duty cannot be shifted to another, was not intended by that court, as appears from the face of its opinion, to have any application to such a machine as a handcar, which is only dangerous by reason of improper use. By reference to the brief of counsel for defendant in error in *International etc. Ry. Co. v. Cooper*, 88 Tex. 608, it will be seen that it was there urged that the fact that the company had intrusted the engine to its servant made it responsible, though the latter's act of scalding plaintiff was not done in the performance of his duties, and that said Ohio case was relied upon as authority. We were then of the same opinion as above expressed in reference to that case.

MASTER AND SERVANT—ACTS BEYOND SCOPE OF EMPLOYMENT.—The negligence of a servant where not acting within the scope of his employment is not attributable to his master: *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 66 Am. St. Rep. 537; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75, 55 Am. St. Rep. 382. In determining whether a particular act is done in the course of a servant's employment, it is proper first to inquire whether the servant was at that time engaged in serving his master. If not, the master is not responsible, even though the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master: *Monographic note to Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 82.

AVERY v. POPPER.

[92 TEXAS, 337.]

ASSIGNMENT OF PART OF CLAIM—SEPARATE SUITS.

A claim may be assigned in parts to different persons, each of whom acquires a right to so much of the common fund, and is entitled to maintain an action thereon against the debtor. In bringing suit, the assignees should unite or be made parties, and not bring separate suits; but, if separate suits are brought, and then consolidated, the debtor can complain only as to the costs prior to the consolidation.

CHATTEL MORTGAGES—DESCRIPTION—SELECTION BY MORTGAGEE.—A chattel mortgage on a specified number of cows and their calves, out of a designated herd containing a larger number, with power to the mortgagee to sell on default, gives him the right to select such cows and calves from the herd, provided the selection is made while the calves are following the cows, but if the selection is not made until the calves have ceased to follow their dams, all right of selection as to the calves is lost.

CHATTEL MORTGAGES—REGISTRATION AS NOTICE.

A recorded chattel mortgage, with power in the mortgagee to sell on default, is notice of the rights of the mortgagee to a purchaser from the mortgagor.

APPELLATE PRACTICE—REVERSAL OF JUDGMENT.

A judgment cannot be reversed on appeal if, upon the whole case, it is right, though an erroneous reason may be given for entering it.

ASSIGNMENT OF PARTS OF CLAIM—SEPARATE ACTIONS—SEQUESTRATION.

—If separate actions are brought by the respective assignees of a debt or claim and afterward consolidated, this is merely an irregularity, and does not render void writs of sequestration issued in such actions prior to the consolidation.

Cobb & Avery, for the appellants.

Craddock & Looney, for the appellees.

339 BROWN, A. J. I. Popper & Brother filed suit in the district court of Hunt county on June 29, 1893, against J. H. and M. E. Cooke, W. W. Avery, and John M. Avery, to recover \$775 of a note made by J. H. and M. E. Cooke to T. H. King, dated on May 26, 1891, due on the 1st of November, 1891, and interest thereon; and R. R. Neyland & Co., consisting of R. R. Neyland, filed suit in the same court on the same day against the said parties to recover of the said M. E. Cooke and J. H. Cooke the balance of the same note, and in each case the plaintiff sought to foreclose a mortgage upon property hereinafter described, which was alleged to be in the possession of W. W. and J. M. Avery. The two suits were consolidated, and the case tried before the judge without a jury, who rendered judgment in favor of the plaintiffs each for his proportion of the note and interest against J. H. and M. E. Cooke, and against J. M.

Avery and his sureties on a replevy bond for the value of fifty cows, one bay mare colt, one bay horse colt, and one black mule colt. Upon appeal, the judgment was reformed and rendered in favor of the plaintiff for the amount adjudged by the court below and for the further sum of \$534.

We copy the conclusions of fact of the court of civil appeals as follows: "On May 26, 1891, J. H. Cooke and his wife, M. E. Cooke, executed and delivered to T. H. King their joint and several promissory notes for \$1,940, payable on the first day of November thereafter, with interest from January 1, 1891, at the rate of twelve per cent per annum. The note provided for ten per cent attorney's fee, if placed in the hands of an attorney for collection. On the tenth day of April, 1892, the payee, T. H. King, transferred, without recourse, to I. Popper & Brother an interest of \$775 in said note, with interest thereon at the rate expressed in the note from its date. At the same time, said payee transferred, without recourse, the balance of said note, principal and interest, to R. R. Neyland, under the firm name of R. R. Neyland & Co. To secure the payment of said note, the makers thereof, on May 26, 1891, executed and delivered to T. H. King their chattel mortgage, whereby they conveyed to him, among other property, fifty cows, with their spring calves (spring of 1891), cows branded 'COOK' on the left side, and 'AK' on left hip, the calves at the time not branded; also one bay mare colt, one bay horse colt, and one black mule colt. This instrument was filed and duly registered as a chattel mortgage in the chattel mortgage register of Hunt county, Texas, in which the mortgagors resided and the property was situated, on May 30, 1891. On June 14, 1893, the United States marshal, by virtue of an execution issued on June 9, 1893, out of the United States circuit court of Dallas, on a judgment therein rendered in favor of W. W. Avery and against J. M. Cooke and sureties on his sequestration bond, but not against his wife, said sureties being O. Hail and William Hodges and J. M. Johnston, levied upon the property above described. The levy was made in Hunt county by direction of J. M. Avery, the attorney of W. W. Avery. All of said property was, on June 28, 1893, by virtue of said execution, sold by the United States marshal in Hunt county, Texas, at public outcry, and was bid in by J. M. Avery in the ³⁴⁰ name of W. W. Avery, the amount of the bid being credited upon the execution, and all of the property was then delivered by the marshal to J. M. Avery, the attorney of W. W. Avery. On June 29, 1893, I. Popper & Brother and

R. R. Neyland & Co. filed separate suits against J. H. and M. E. Cooke and W. W. and J. M. Avery to recover of the makers of the note above described the amounts respectively due them by reason of the transfer of said note by the payee, and to foreclose the mortgage given to secure the note upon the property above described. The property was seized, while in possession of J. M. Avery, by virtue of writs of sequestration issued in these suits. After such seizure J. M. Avery replevied and resumed possession of the property, Charles C. Cobb and H. I. Phillips being the sureties on his replevy bond. After J. M. Avery replevied the property, he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below, and would have been wholly unable to produce said property, or any part thereof, in satisfaction or partial satisfaction of the judgment rendered in said court. At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given, but the evidence is sufficient to show that, just prior to the execution of the mortgage, the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Neyland (Avery) was levied upon the property in controversy. The evidence is reasonably sufficient to show that the fifty head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mrs. M. E. Cooke at the time the mortgage was executed, and continued to be her separate property until disposed of by Mr. Avery. The fifty calves were calved during the marriage of J. H. Cooke and wife, after the cows became the separate property of Mrs. M. E. Cooke, and were, therefore, when the mortgage was given, and the execution in favor of Avery levied, community property of J. H. and M. E. Cooke. The horses and mules involved in this suit were the offspring of the separate property of M. E. Cooke during her marriage with J. H. Cooke, and were likewise the community property of J. H. Cooke and wife at the time the mortgage was given and the writ of execution in favor of Avery levied upon same. From the view we take of the case, which will be shown in our conclusions of law, we do not deem it necessary to pass upon the

question as to whether or not the deed of trust made on the fifteenth day of November, 1889, by J. H. Cooke to J. E. Steger, through which Mrs. M. E. Cooke claims the property mortgaged to secure the debt sued on, was fraudulent; but, if we deemed the question essential to a proper disposition of this case, we should find that the testimony is reasonably sufficient to show that such deed of trust was made by J. H. Cooke, for the ³⁴¹ purpose of securing his creditors, among whom was his wife, M. E. Cooke, and that the value of the property did not exceed the indebtedness it was transferred to secure. The finding of the trial court, which is sustained by the evidence, as to the value of the property in controversy, is as follows: 'Cows, \$13 per head; horses, \$50 per head; mules, \$75 per head; seventeen two year old past steers, \$12 per head; and thirty-three two year old past heifers, \$10 per head'—aggregating \$1,384. Excluding the property sequestered upon which the mortgage is sought to be foreclosed, the remainder of the property covered by the King mortgage was in June or July, 1893, worth \$700. Since that time some of the stock not sequestered have died and some strayed, so that those left on hand when the suit was tried in the court below did not exceed in value the sum of \$200. When the suits which were consolidated were instituted, the appellant J. M. Avery resided in Dallas county, and has resided in that county continuously ever since that time. The evidence is insufficient to show the mortgage given to secure the note sued on was fraudulent or that the property exceeded in value the debt it was mortgaged to secure."

The judgment of the district court quashing the writs of sequestration issued in the separate suits originally instituted by the plaintiffs in this case was not reversed by the court of civil appeals, and no complaint is made in this court by the defendants in error of that action of the district court. In considering all questions growing out of the quashing of those writs, that order will be treated as correctly rendered and the writs properly quashed.

When the district court quashed the writs of sequestration in the original cases, the replevy bonds given by J. M. Avery and his sureties, Cobb and Phillips, fell with the writs upon which they were based, and the district court erred in entering judgment against Avery and his sureties on the replevy bonds: *Mitchell v. Bloom*, 91 Tex. 634.

At common law a part of a debt could not be assigned. Such assignment was void and passed no title or right whatever in the

claim, and of course, no action could be maintained by the assignee of a portion of a claim. But in equity such assignments are sustained, and it is now the established doctrine in this state that a claim may be assigned in parts to different persons, each of whom acquires a right to so much of the common fund and is entitled to maintain an action thereon against the debtor: *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. Rep. 467; *Clark v. Gillespie*, 70 Tex. 513; *Johnson v. Amarillo Improvement Co.*, 88 Tex. 505. The proceedings in the separate suits instituted by Popper & Brother and Neyland were not void in their beginning, but were improperly brought because they should have joined in one action, and failing to do so, Popper & Brother, who filed the first suit, should have made Neyland a defendant, or the latter might have intervened in that suit. The debtors, J. H. and M. E. Cooke, could have forced consolidation of the cases, but they made no objection, and we doubt if Avery had a right to complain. However, the most that he could claim is, that he should not be charged with the costs ³⁴² unnecessarily incurred by prosecuting two suits instead of one, and this protection he has received by the judgment of the court of civil appeals.

It is claimed that the mortgage sought to be foreclosed in this case is void: 1. Because it was an attempt to mortgage a part of a larger number of cows without separating or designating the particular cows; and 2. If valid as between the parties, it is not good as against execution creditors.

The marks and brands designated the herd of the mortgagors as the group which included the cows and calves mortgaged, but, being a part of a larger number of the same description and not having been separated nor identified, no lien attached to any particular animals in the herd. The question is, Do the terms of the mortgage, construed in the light of the attending circumstances, confer upon the mortgagee any right in the herd of cattle? When the mortgage was made, the mortgagors owned in Hunt county more than one hundred cows with calves following them, branded and marked as described in that instrument, which was known to the mortgagee, King, at the time, and the evidence and the findings of fact do not show that the mortgagors had any similar cattle outside of that herd. J. H. and M. E. Cooke executed the mortgage for the purpose of securing the payment of a debt owing by them to King, and, in order to accomplish that purpose, empowered King, in case of default in the payment of the debt, to sell the cows and calves

at the courthouse door in Greenville, Hunt county, and to apply the proceeds to the payment of their indebtedness to him.

In the light of these facts, the mortgage must be interpreted by applying to it the following rules of law: 1. Its terms must be construed most strongly against the makers; 2. Effect must be given to the intent of the parties; 3. The law presumes that the mortgagors intended to confer some benefit upon the mortgagee; 4. Authority will be implied to do everything necessary to the execution of an express power.

As we have seen, no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. The power was given to sell certain cows and their calves, which could only be done by selecting them from the herd, and it being necessary to the execution of the express authority to sell, the law will imply the authority to take the fifty cows and calves from the larger number: *Oxsheer v. Watt*, 91 Tex. 124, 66 Am. St. Rep. 863. The chattel mortgage was valid between the parties to it.

Upon default in payment, King, or the holders of the note, had the right to select from J. H. and M. E. Cooke's stock of cattle and sell fifty cows and calves corresponding to the description in the mortgage. If the right had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But, having failed to exercise the right until, in the course of nature, the dam and the young would separate, it has become impossible ³⁴³ to identify the calves, and all claim upon them had failed before Avery converted the stock.

The owner of property has the right to dispose of it as he may choose or to grant to another any right in it which is not inconsistent with his obligation to creditors, nor in violation of any law, and one who purchases property that has been so disposed of or encumbered, with notice of the right conferred, will take it subject to the burden fixed upon it: *Kuhn v. Common Council*, 70 Mich. 535.

If the instrument in question had, in express terms, authorized T. H. King to select the fifty cows and calves from the herd belonging to Cooke and wife, we presume that no one would have questioned its validity as between the parties nor as to any person whose rights were subsequently acquired with notice, nor would there have been a doubt that it was a chattel mortgage. We think that any person who might read it, knowing of the herd of one hundred cows in the same mark and brand, the

property of the mortgagors, must know that the instrument conferred by implication the right to select from the herd the fifty cows. The implication of authority gives to the instrument the same legal effect as if it were expressed. It was "intended to operate as a lien upon the property named," and is within the terms of article 3328 of the Revised Statutes. The record of it constituted constructive notice to Avery.

We have examined the authorities cited by the plaintiffs in error and find none of them to be in conflict with *Oxsheer v. Watt*, 91 Tex. 124, 66 Am. St. Rep. 863, cited above. The cases cited are distinguishable from that case by the absence from the former of the designation of a particular group of articles in which those described in the mortgage were included, and the want of either express or implied authority to make selection of the thing mortgaged from the larger number of things designated by its terms and attendant circumstances.

We have carefully examined the twenty-one assignments of error contained in the application for a writ of error, and have discussed those that we deem of importance sufficient to demand it. We do not feel called upon to enter upon the discussion of each of this large number of assignments, but will dispose of those not particularly mentioned by saying we find no material error in the acts of the court complained of.

By means of the replevy bond, Avery got possession of the property and converted it to his own use. He was liable for its value and the judgment against him was properly entered.

The district court erred in rendering judgment against C. C. Cobb and H. I. Phillips and in taxing plaintiffs below with the costs of both original suits up to the time of consolidation, and the court of civil appeals properly reversed the judgment as to that cost.

The court of civil appeals erred in affirming the judgment of the district court against Cobb and Phillips; also in reversing the judgment of the district court which refused judgment for the value of the calves, and in rendering judgment against plaintiffs in error for their value. It is therefore ordered that the judgments of the district court and of ³⁴⁴ the court of civil appeals, as between Popper & Brother and R. R. Neyland and J. M. Avery be reversed and set aside, and this court render the judgment which should have been rendered in the district court, as follows: That I. Popper and E. Popper, composing the firm of I. Popper & Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., recover of J. M. Avery the sum of \$850,

with six per cent interest per annum from November 23, 1897, with all costs which accrued in the district court in cause No. 3,406, entitled I. Popper & Brother v. J. H. and M. E. Cooke et al., and in the consolidated case. It is further ordered that C. C. Cobb and H. I. Phillips go hence without day; that plaintiffs I. Popper & Brother and R. R. Neyland pay the costs which accrued prior to consolidation in the district court in case No. 3,407, styled R. R. Neyland & Co. v. J. H. and M. E. Cooke et al., and all costs in this court and in the court of civil appeals. The sum adjudged against J. M. Avery will be divided between I. Popper & Brother and R. R. Neyland in the proportion of their judgments against J. H. Cooke in the district court, and when collected, to be a credit upon those judgments.

ON MOTION FOR REHEARING.

BROWN, A. J. We devoted much time to the examination of the questions presented in the motions for rehearing in this case when it was under investigation, and we have again carefully examined the various assignments and find no error in our former opinion upon the points presented in the motion of John M. Avery, and it is therefore overruled. We do not feel called upon to discuss those questions further.

In our former opinion, the judgments of the district court, which quashed the writs of sequestration issued in the original suits, were treated as subsisting and correct orders because they had not been set aside by the action of the court of civil appeals. Upon further consideration of the matter as presented in the motion of I. Popper & Brother and R. R. Neyland, we conclude that we were in error in so holding. It is the practice of this court not to reverse a judgment of the district court or of the court of civil appeals if, upon the whole case as presented, the judgment is right, although an erroneous reason may be assigned for entering it. Applying this rule, we have examined the motions made to quash the several writs of sequestration and conclude that the district court erred in quashing them; the judgment sustaining the motions is reversed. The ground upon which the court acted, as stated by the defendant in error, which is not denied by plaintiff, was that the suits instituted by each of the appellants separately were brought without authority of law, and that the proceedings under them prior to the consolidation were void. We have held that they were not void, but irregular, from which the conclusion must be reached that the writs of sequestration were valid.

345 The other grounds assigned in the motion of I. Popper & Brother and R. R. Neyland are overruled.

If Popper & Brother and R. R. Neyland had joined originally in the one suit each one would have prosecuted it for the amount of money due to such party, and if the writs of sequestration had been sued out in such joint suit by the owners of the note, they must have been separate proceedings by each, because one of the parties could not be required to swear to the debt due to the other nor to give bond for damages caused by the prosecution of that claim. It follows that the costs which accrued from suing out the writs of sequestration must have been incurred if the suit had been brought jointly in the first instance by the owners of the note. The judgment of this court is erroneous in charging against I. Popper & Brother and R. R. Neyland the costs which were occasioned by suing out and executing the writ of sequestration in one of these cases. It is therefore ordered that the judgment heretofore entered in this cause be set aside, and that judgment be now entered that I. Popper and E. Popper, composing the firm of I. Popper & Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., recover of J. M. Avery and the sureties on his replevy bond, Charles C. Cobb and H. I. Phillips, the sum of \$850, with six per cent interest per annum from November 23, 1897, with all costs which accrued in the district court in cause No. 3,406, entitled I. Popper & Brother v. J. H. and M. E. Cooke et al., and all costs which accrued in the consolidated case; also all costs which were occasioned by suing out and executing the writ of sequestration in case No. 3,407, styled R. R. Neyland v. J. H. and M. E. Cooke et al., and that the said I. Popper and E. Popper and R. R. Neyland pay all other costs accruing in No. 3,407 prior to the consolidation of the said causes, except cost of the sequestration, and that the said I. Popper and E. Popper and R. R. Neyland pay all costs in this court and in the court of civil appeals. The sum adjudged against J. M. Avery will be divided between I. Popper & Brother and R. R. Neyland in the proportion of their judgments against J. H. Cooke in the district court, and, when collected, to be credited upon those judgments.

ON MOTION FOR REHEARING.

The motion of J. M. Avery, C. C. Cobb, and H. I. Phillips for rehearing is overruled, and they are adjudged to pay the cost of this motion. It appearing that an error was committed

by this court in its last judgment in adjudging the costs of the court of civil appeals against I. Popper & Brother and R. R. Neyland, it is ordered that said judgment be so reformed that the costs of the court of civil appeals be adjudged against J. M. Avery, C. C. Cobb, and H. I. Phillips.

Reformed and rendered.

ASSIGNMENT OF PART OF CLAIM—EFFECT AT LAW AND IN EQUITY.—A part of an entire demand cannot be assigned at law so as to enable the assignee to bring an action upon it without the consent of the debtor: *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740, and extended note. Parts of a single demand may be assigned to different parties in equity, and the rights of all the parties settled in one suit brought by a single assignee. In such suit, not only the debtor and assignor, but all assignees or claimants, to any part of the fund can be made parties, so that one decree may determine the duty of the debtor to each claimant, and his rights and interests be fully protected thereby: *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740; see the extended note to *Harris County v. Campbell*, 2 Am. St. Rep. 472.

CHATTEL MORTGAGE—DESCRIPTION—SELECTION OF PROPERTY.—If it is necessary for a mortgagee of fifty mares, branded "F2," to select the animals from a herd of three hundred mares in that brand, before the property mortgaged can be identified, it would be better to require the selection to be made before, or at the time of, the foreclosure of the instrument, but neither the mortgagor nor a purchaser with notice can complain of a decree foreclosing upon fifty average head of the whole number: *Oxsheer v. Watt*, 91 Tex. 124, 66 Am. St. Rep. 863, and note; monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 240.

CHATTEL MORTGAGES—RECORDING AS NOTICE.—A valid chattel mortgage properly recorded, though overdue and unpaid, is notice to the world: *Brown v. James H. Campbell Co.*, 44 Kan. 237, 21 Am. St. Rep. 274, and note.

APPELLATE PRACTICE—AFFIRMING JUDGMENT.—A judgment, if correct, will be affirmed, although it was rendered upon grounds that were insufficient: *Railway Co. v. Wilson*, 90 Tenn. 271, 25 Am. St. Rep. 693; *Short v. Taylor*, 137 Mo. 517, 59 Am. St. Rep. 508. The only question on appeal is whether the judgment of the lower court was correct or not, regardless of the reasons that may have been given for that judgment: *Estate of Grossman*, 175 Ill. 425, 67 Am. St. Rep. 219.

**GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY
COMPANY v. ZANTZINGER.**

[92 TEXAS, 365.]

APPELLATE PRACTICE—CERTIFIED QUESTIONS.—If a statute authorizes an inferior court to refer an issue in law to the supreme court for determination, and makes it the duty of the lower court, "to certify the very question to be decided," "the very question" referred to does not mean an abstract question, which may determine the issue as presented in the lower court, but it means the issue itself as there presented and the precise question ruled upon as shown by the record.

MASTER AND SERVANT—LIABILITY FOR WILLFUL INJURY TO TRESPASSER.—A railroad engineer, who intentionally throws steam and hot water upon a trespasser, in order to drive him from his engine, is guilty of an intentional and willful, and not a merely negligent, wrong; and in such case the railroad company is liable.

NEGLIGENCE—WILLFUL—CONTRIBUTORY.—If the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover unless the act of the defendant is willful, and, in the latter event, the injured party may recover, although his contributory negligence caused damage not intended by the defendant.

NEGLIGENCE—WILLFUL—CONTRIBUTORY.—If a railroad engineer throws steam and hot water upon a trespasser, with intent to drive him from his engine, and the trespasser is guilty of contributory negligence in attempting to jump from the engine to a car attached thereto, and thereby adds to his injury, he is still entitled to recover all damages resulting from the willful assault by the engineer.

NEGLIGENCE—WILLFUL—CONTRIBUTORY.—If a plaintiff who has suffered from an intentional and willful tort has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a willful omission, he cannot recover for the damages which might have been prevented by proper care, but he can recover his full damages when he has been guilty of ordinary negligence only.

A. L. Jackson, for the appellant.

Baldwin & Meek, O. T. Holt, and J. H. Davenport, for the appellees.

307 GAINES, C. J. The court of civil appeals for the first supreme judicial district has certified for our decision the following questions:

"The plaintiff, Mrs. E. S. Zantzinger, who is joined in this action by her husband, is the mother of Almer Campbell, a minor, and the suit is in her own behalf, as well as in behalf of her son, to recover damages for personal injuries sustained by

him, as it is claimed, through the negligence of the appellant, who was defendant below.

"The evidence adduced at the trial showed that defendant had a train of cars attached to the front end of a switch-engine, which was running backward, pulling the cars after it, into the city of Houston from a neighboring station. The switch-engine had no pilot or 'cowcatcher' in front of it, but attached at each end was a footboard extending across the track. The car nearest the engine was a flat car, several feet intervening between it and the footboard. While the train was slowly moving, Almer Campbell, without permission of anyone and contrary to the rules of the company, entered upon the footboard for the purpose of riding into Houston, and stood upon it between the engine and flat car. After he had ridden a short distance, the cylinder cock of the engine was opened by the engineer and hot water and steam were thereby thrown upon his legs and feet, whereupon he sprang from the footboard toward the flat car, intending to get upon the latter, but missed it and fell upon the track and was run over and injured. There is evidence tending to show that the cylinder cock was opened by the engineer for the purpose of throwing the steam and water upon the boy in order to make him get off the engine, but the evidence does not warrant the conclusion that the engineer intended more than this, or that he intended ³⁶⁸ to injure Campbell in the way in which he was injured. The engineer had authority to eject persons wrongfully riding upon the engine. There is also evidence tending to show that the fright and pain caused to Campbell by the steam and water also caused him to lose his presence of mind and to make the leap in order to escape. The steam and water caused pain and fright, but did not injure the skin. He testified that he was facing the engineer with his back to the flat car, and that, after the escape of steam and water commenced, he turned and made the leap, calculating to reach the flat car with his feet but not his hands; that after he fell between the cars he crawled forty or fifty feet in the direction in which the train was moving in order to avoid the brake beam under the flat car, and then attempted to get across the rail, and was caught. There is also evidence tending to show that the engineer saw Campbell fall between the cars, knew his danger, and could have stopped the train in time to have avoided the injury. This we do not regard as affecting the questions certified.

"The evidence is uncontradicted that, in getting upon the footboard, Campbell was a trespasser and was guilty of negligence, and the court below so instructed the jury. He was nearly seventeen years of age, and understood the dangers and risks of the situation.

"The charge given below submitted only two grounds upon which the plaintiffs could recover, and carefully restricted the jury to them. The first is stated in the charge set out below, and the second submits the question of whether or not the engineer, after discovering Campbell's danger, used proper care to prevent the injury. As to the latter, we deem it unnecessary to state more. The charge referred to is as follows:

"You are instructed that if you find from the evidence that, at the time and place stated in plaintiff's petition, Almer Campbell got upon the footboard or running-board attached to the engine then being operated on defendant's line of railway by its agents and servants, and that while the said Almer Campbell was standing upon said footboard, and while said engine and train of cars were in motion, the defendant's engineer in charge of said engine, by means of the cylinder cocks attached to said engine, caused hot water or steam to be thrown upon said Almer Campbell's person, for the purpose of frightening or scaring him off the engine, and that the opening of the cylinder cocks for the purpose of letting out the hot water or steam was done for the purpose of throwing the water upon the said Almer Campbell, and not in the operation of the engine, and you further find that to eject Almer Campbell from his position on the footboard of the engine was within the scope of the duty of said engineer in operating the engine, and that he had implied authority to do so, and that said act on his part of throwing the water or steam on Almer Campbell was negligence, as herein defined; and if you further find that the hot water or steam so thrown on said Almer Campbell so frightened him or caused him such pain that in order to escape therefrom he made an attempt to jump upon ^{and} the flat car in front of the engine, and fell upon the track where the wheels of said car passed over his leg, injuring substantially as set out in the petition; and you further believe that the said act of the engineer in turning the hot water or steam upon the said Almer Campbell was negligence, as hereinafter defined, and was the proximate cause of the said accident, you will find for the plaintiffs."

"The questions certified are as follows: 1. Should the act of the engineer in throwing out the steam and water for the pur-

pose of ejecting Campbell from the engine be deemed willful in its relation to the result which actually followed, but was not intended, so that the negligence of Campbell in placing himself in such a position, without which he would not have received his injury, cannot be considered contributory negligence; or should such act of the engineer be regarded as only a negligent cause of such injuries with which the negligence of Campbell may be considered as contributing to the result? 2. Should the court, in applying to the facts of this case as above stated the rule announced in *Railway v. Neff*, 87 Tex. 303, have assumed that Campbell's act in making the leap described was not contributory negligence, and that he was excused by the act of the engineer and other facts of the situation from the exercise of ordinary prudence; or should it have submitted to the jury the question of the adequacy of such facts to produce a state of mind in which ordinary prudence should not be expected of him, and the further question whether or not such state of mind was produced?"

The statute which authorizes a court of civil appeals to refer an issue in law to this court for determination makes it the duty of the chief justice of that court "to certify the very question to be decided": Rev. Stats., art. 1043. By "the very question" we do not understand is meant an abstract question which may determine the issue as presented in that court, but the issue itself as there presented. For example, if it be the correctness of the ruling of the court in sustaining or overruling an exception to a pleading, the substance, at least, of the pleading and of the exception ought to be set out in the statement, and not merely an abstract question submitted, which may, in the opinion of that court, determine the point. Such, as we think, is the rule also as to the giving or refusal of instructions, the admission or exclusion of evidence, and, in general, to all the issues of law which may be presented upon the appeal. It is the precise question ruled upon in the trial court as shown by the record in the court of civil appeals which that court is authorized to certify, and which we have jurisdiction to determine.

In the certificate before us, a portion of the charge of the court is set forth, and the questions certified seem to bear upon the correctness of the instruction quoted. It resolves itself, as it seems to us, into a question whether or not the charge be correct in the particulars indicated ³⁷⁰ by the inquiry. We infer from the statement accompanying the questions that the action of the minor son to recover damages for his injuries and

that of his mother to recover for the loss resulting to her from the same cause were prosecuted together in one proceeding without objection. We have had some doubt whether we ought to answer the second question; and we are now of opinion that, if we had the case of the son only, that question would be abstract and should not be determined. So far as he is concerned, upon the hypothesis stated in the instruction, he was entitled to recover at least for the assault made upon him, without reference to the injuries which subsequently resulted, and therefore as to him the charge was correct. The jury were not told that he had a right to recover for the injury to his leg. If such instruction was elsewhere given, the court of civil appeals has not so stated. Therefore, it seems to us that the question of his right to recover for the loss of his leg, in the event that his action succeeding the assault upon him was negligent, does not arise out of the very question before the court of civil appeals.

But the case of the mother is different. It is apparent from the statement of the case that no injury resulted to her simply from the throwing of the hot water upon her son. If it had stopped there, no loss would have resulted to her. Her right of action, if it exists at all, results from the injury to his leg and the consequent expenses and loss of service. Therefore, unless upon the facts hypothetically stated in the instruction of the court she was entitled to recover the damages resulting to her from that injury, the charge is not correct as a whole. The charge makes no distinction as to the respective rights of the mother and the son, but instructs the jury, if they find the facts as stated, to find "for the plaintiffs." We conclude that, in this aspect of the case the question of the correctness of the charge presents both points upon which it seems the court of civil appeals desired to elicit our opinion, and we therefore proceed to answer the questions.

1. If the servants of the appellant company purposely threw the hot water upon Campbell, it was an intentional and not a negligent wrong. The fact that he was a trespasser upon the train did not justify the engineer's conduct. The latter had the right to remove him, and for that purpose to put his hands upon him, and to use such force as was necessary to accomplish that end. But the means adopted resulted in an assault. We answer the first question in its first form in the affirmative, and in its second form in the negative.

2. The second question presents a novel and difficult point, and one upon which we have found no direct authority. It must

be resolved upon principle. When the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover. It is not so if the act of the defendant be willful. In speaking of the rule of contributory negligence, the supreme court of Indiana says: "The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery," ³⁷¹ for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery": *Steinmetz v. Kelly*, 72 Ind. 442, 37 Am. Rep. 170. See, also, *Ruter v. Foy*, 46 Iowa, 132; *Brownell v. Flagler*, 5 Hill, 282.

The principles announced apply to the question of the original right of action. The question under consideration, however, involves rather an inquiry as to the duty of a party who has been injured by the fault of another to use reasonable precautions to avoid the consequences of his injury: 1 Sedgwick on Damages, sec. 202. In negligence cases, such duty is usually regarded as a part of the law of contributory negligence. The rule is, that if a plaintiff who has been injured by the negligent conduct of the defendant fails to exercise reasonable care to avoid the consequences of his injury, he cannot recover for so much of his damage as results from that failure. But does this rule apply to the case of a willful injury? We are of the opinion that it does not. Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might, by the use of due care, have avoided the battery, we think, where the injury is intentional, he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part. If negligence contributing to the injury cannot be set up to defeat the action when the act of the defendant was willful, by a parity of reasoning, the defendant in such a case should not be permitted to say that, but for the negligence of the defendant in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery.

We apprehend that a plaintiff cannot make a case by intentionally contributing to the injury which the defendant willfully intends to inflict upon him. For example, should one intentionally hurl a missile at another with the intent to injure,

and should the other voluntarily place himself in its way and thereby receive a battery which he would otherwise have escaped, the person so struck could not recover. So, when he has been intentionally injured, he should not be permitted to recover damages which have resulted from his willful omission to take reasonable precautions to avoid the consequences of the wrong. Since a negligent act of the plaintiff contributing to a result brought about by the concurring negligent act of the defendant exonerates the defendant from the consequences of his wrong—pro tanto at least—so a willful act of the plaintiff should have a like effect in case of an intentional injury: *Loker v. Damon*, 17 Pick. 284. In the case cited, Chief Justice Shaw says: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully and leave the gate open; if, before the owner knows it, cattle enter ³⁷² and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and willfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, the damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the costs of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say that, in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages for that part of the injury which consisted in removing the fence and leaving the close exposed." Where, in the case of an intentional tort, the plaintiff has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a willful omission on his part, he ought not to recover for the damages which might have been prevented by proper

care; but, on the other hand, we think that he should recover his full damages where he has been guilty of ordinary negligence only. A party cannot voluntarily inflict an injury upon another and then claim that the party injured owes him the duty to exercise ordinary care to protect him from the consequences of his act.

We answer the second question by saying that in our opinion the trial court did not err in failing to submit the question of Campbell's contributory negligence in the charge set out in the statement.

MASTER AND SERVANT—LIABILITY FOR WILLFUL INJURY.—A master is liable for the willful and wrongful act of his servant directly within the scope of his employment, though not sanctioned or ratified by the master: *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99. The old rule that the master was never liable for the willful or malicious act of his servant is not now the law. He is answerable if the act was done in his master's business, and that is the true test of his liability: *Richberger v. American Exp. Co.*, 73 Miss. 161, 55 Am. St. Rep. 522. See the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71. In *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 27 Am. St. Rep. 223, it was held that an engineer in charge of a locomotive, who, with intent to frighten passengers on a street-car, backs the locomotive toward and so near such car that they become frightened, and jump off and are injured, is not acting in the prosecution of his master's business, and the latter, therefore, is not liable for the damages resulting to such passengers.

NEGLIGENCE—WILLFUL—CONTRIBUTORY.—The contributory negligence of the plaintiff does not preclude his recovery when the conduct of the defendant is wanton and willful, or where it indicates that negligence or indifference to the rights of others which must justly be characterized as recklessness: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21; *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 17; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218.

ANDERSON v. WACO STATE BANK.

[92 TEXAS, 506.]

PLEDGE—CORPORATE STOCK—WIFE'S SEPARATE PROPERTY PLEDGED FOR HUSBAND'S DEBT—RELATIVE RIGHTS OF PARTIES.—A bona fide pledge by a husband as security for his loan of corporate stock issued in his name and showing him to be the owner entitles the pledgee to hold the stock as against the wife of the pledgor, whose separate means were used in its purchase, and who had instructed her husband to purchase it in her name, and did not know of nor consent to its issuance in her husband's name, nor of its pledge by him for his own debt. The pledgee holding both the legal and equitable title to the stock, his claim must prevail.

W. S. Baker and S. P. Ross, for the appellant.

A. C. Prendergast, for the appellee.

507 DENMAN, A. J. In this cause the court of civil appeals have certified the following explanatory statement and question:

"The Waco State Bank brought this suit against Lucy Anderson, the surviving wife of H. C. Anderson, and H. C., May, John, and Hortense Anderson, minor children and heirs of H. C. Anderson. The action is founded upon a promissory note for three hundred dollars executed by H. C. Anderson June 9, 1896, payable to said bank or order, ninety days after date, with interest after maturity at ten per cent per annum, and ten per cent attorney's fees. To secure the payment of the note, H. C. Anderson, deceased, delivered to and pledged with the bank nine shares **508** of stock of the face value of one hundred dollars each in the Texas Savings Loan Association.

"The plaintiff in error, Mrs. Lucy Anderson, alleged that the shares of stock referred to were her separate property, and were pledged to the bank without her authority. The bank alleged that it was an innocent pledgee of the stock, that it had no notice of Mrs. Anderson's claim thereto at the time it acquired it, and it took it as security for money advanced to H. C. Anderson, and prayed for a foreclosure of its lien on said stock.

"The district court held that the bank was an innocent holder of the stock, and entitled to have its lien foreclosed as against all of the defendants, and rendered judgment accordingly. The uncontroverted testimony shows and we find that H. C. Anderson, deceased, borrowed three hundred dollars from the Waco State Bank, and to secure the same pledged the shares of stock

referred to. The certificate of stock referred to reads as follows:

“No. 129.

9 shares.

“Texas Savings Loan Association.

“Incorporated Under the Laws of the State of Texas.

“Capital stock, \$100,000.

“This certifies that H. C. Anderson is the owner of nine shares of one hundred dollars each of the capital stock of the Texas Savings Loan Association, transferable only on the books of the corporation, in person or by attorney on surrender of this certificate.

“In witness whereof, the duly authorized officers of this corporation have hereunto subscribed their names and caused the corporate seal to be hereto affixed at Waco, Texas, this 30th day of March, A. D. 1896.

[Seal]

(Signed) “W. D. MAYFIELD,

“President.

“JOHN D. MAYFIELD,

“Secretary.”

“At the time H. C. Anderson pledged the stock to the bank, he made the following indorsement on the back thereof:

“For value received, — hereby sell, transfer, and assign to — the shares of stock within mentioned, and hereby authorize — to make the necessary transfer on the books of the corporation. Witness my hand and seal, this 9th day of June, 1896.
H. C. ANDERSON.

“Witness:

“Meredith A. Sullivan.

“W. W. Seley.”

“The bank accepted this stock as collateral security for the money loaned to Anderson and, at the time of doing so, it had no notice of the fact that the stock had been purchased with the separate means of Mrs. Anderson and no notice of the fact that she claimed said stock as her separate property. In fact it was some time after the death of H. C. Anderson, and after the maturity of the note, that the bank learned of Mrs. Anderson's claim to the stock. The uncontroverted testimony further shows, and we find that, prior to the issuance of the stock referred ⁵⁰⁹ to, Mrs. Anderson had a sum of money belonging to her separate estate which was in the possession of H. C. Anderson, her husband; that she directed

her husband to invest the same in stock of the corporation referred to, but instructed him to take the same in her name. Instead of carrying out these instructions, H. C. Anderson invested his wife's money, the same being her separate property, in the stock referred to, and had the same issued in his name, as shown by the certificate of stock set out above. Mrs. Anderson was not aware of this until after H. C. Anderson's death, and said nothing to the bank to induce it to accept the stock as security. We also find that H. C. Anderson, at the time he borrowed the three hundred dollars referred to, and at the time of his death, was insolvent, and that his estate is now insolvent.

"With the foregoing statement and explanation, the court of civil appeals for the third district certifies to the supreme court for decision the following question: Under the facts above stated, is Mrs. Lucy Anderson estopped from asserting her title to the shares of stock referred to; and, as against her, does the bank occupy the position of an innocent pledgee, and is it entitled to have its lien foreclosed upon said stock?"

The recital in the certificates "that H. C. Anderson is the owner" would estop the loan association from denying that the legal title was in him in a controversy between it and a bona fide purchaser from him. The transaction between the bank and Anderson constituted it a bona fide holder of such stock, and passed all the title held by Anderson to it as security for the loan. Thus, for the purpose of security, it held both the legal and equitable title to the stock. Mrs. Anderson, at most, had only a right in equity to compel H. C. Anderson to transfer the stock to her; therefore, the bank and she each having an equity, and the bank having, in addition, secured the legal title as collateral for its loan, its claim must prevail over hers: *Winter v. Montgomery Gas Light Co.*, 89 Ala. 544; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Mandlebaum v. North American Min. Co.*, 4 Mich. 465; *Hill v. Moore*, 62 Tex. 610; *Edwards v. Brown*, 68 Tex. 329. Having answered that the bank is an innocent pledgee and entitled to have its lien foreclosed, we deem it unnecessary to pass upon the question of estoppel.

PLEDGE OF CORPORATE STOCK—RIGHTS OF PLEDGEE.—A pledgee of fraudulent certificates of stock, who has advanced money upon the faith of the representations made in the face of the stock, is entitled to indemnity for his loss against the corporation issuing the stock: *Appeal of Kisterbock*, 127 Pa. St. 601. 14 Am. St. Rep. 868. A person to whom stock of a corporation is issued, and in whose name the same stands on the corporation books as

the owner, is liable to the creditors of the corporation as though he were the absolute owner, although he was in fact a pledgee, agent, or trustee of the real owner: *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158. As to rights and obligations of a pledgee generally, see the monographic note to *Lucketts v. Townsend*, 49 Am. Dec. 734-738.

SPENCER v. JONES.

[92 TEXAS, 516.]

PARTNERSHIP—SINGLE TRANSACTION.—A partnership may exist in a single transaction of purchasing land with a view of selling it for profit.

PARTNERSHIP—SINGLE TRANSACTION—DIVISION OF ASSETS.—If partners in a single transaction of purchase of land and sale for profit divide among them the notes of their vendees given for the purchase price of the land, the notes taken by each party become his individual property, whether the transaction works a dissolution of the partnership or not.

PARTNERSHIP — REPRESENTATIONS BY PARTNER — EFFECT ON COPARTNER.—Representations made by a partner in transferring a note which has become his individual property, do not bind his copartner, though such transfer is made with intent to apply the note to the payment of a partnership debt which has been assumed by the transferring partner.

LIENS — PRIORITIES — FORECLOSURE—PARTIES—RE-IMBURSEMENT.—The holder of a junior lien on a tract of land, not made a party to the foreclosure of a prior lien upon a larger tract, including the former, cannot enforce his lien against the purchaser at the foreclosure sale without first compensating him to the extent that he has discharged such prior lien.

VENDOR AND VENDEE — NOTICE — UNDISCLOSED PARTNERSHIP IN LAND.—A purchaser of notes and a lien given for the purchase price of land from a vendor who holds the apparent legal title is not affected by an agreement, of which he has no notice, between such vendor and his undisclosed partner in the ownership of the land. Such purchaser, however, acquires such lien subject to any right of such secret partner which appears in the chain of title, whether recorded or not.

Frank & Young, O. S. Lattimore, and Greene, Stewart & Edrington, for the appellant.

Martin & George, for the appellee.

517 BROWN, A. J. Jones sued A. A. Chapman and R. B. Spencer, G. W. Simpson, and William C. Vowell to recover of Simpson, as maker, and Chapman, as indorser, the amount of three negotiable promissory notes, executed August 2, 1892, by Simpson, payable to Chapman, for a tract of one hundred and five acres of land, a part of the G. Rockfeller survey, in Erath county, which was conveyed by Chapman to Simpson by deed of

even date with the notes, a vendor's lien being retained in the face of the deed. It was sought to subordinate to the lien of the notes sued on a prior lien claimed by R. B. Spencer upon that and other lands in the Rockfeller survey, which latter lien arose out of a sale and conveyance made April 21, 1890, from Z. Bartlett to A. A. Chapman, for four hundred and twenty acres of the said survey, which included the one hundred and five acres sought to be subjected to the lien in this suit. Vowell was the vendee of Simpson and made party in order to foreclose the lien as to him. We copy the statement of facts as found by the court of civil appeals, which is as follows:

"The conveyance from Bartlett to Chapman was made in pursuance of an agreement between Chapman and Spencer that the title should be taken in the name of Chapman for their joint benefit, it being the agreement that they would divide equally the profits of the venture. Besides a cash payment, five notes of four hundred and twenty dollars each were executed, secured by a lien on the land. While these notes were outstanding, Chapman conveyed the land in four several tracts of one hundred and five acres each to the following persons respectively: Simpson (G. W.), Hayden, Clardy, and Petty, taking their several notes for the deferred payments in his own name, with liens reserved on the land, that conveyed to Simpson being the tract involved in this suit.

"Thereafter, and before the Simpson, Hayden, Clardy, and Petty notes had been collected, in the latter part of the year 1892, the evidence tended to show that Chapman and Spencer had a settlement, in which the notes of Simpson and Hayden were allotted to Chapman, and those of Clardy and Petty to Spencer, with the further agreement that Chapman should pay out of the notes allotted to him those held by Bartlett. In the spring following, Chapman sold and assigned, for a valuable consideration, the Simpson and Hayden notes to Jones, falsely representing at the time, and thereby deceiving Jones, that the Bartlett notes had been paid off and that lien extinguished. The evidence tended further to show that, in the transaction between Chapman and Jones, Chapman promised Jones to redeem these notes in the fall of that year if Jones should desire him to do so. After Jones acquired these notes, Spencer, who still held the other notes (Chapman having become insolvent), paid off the Bartlett debt and took an assignment thereof to himself, under ⁵¹⁸ which, pending this suit, he became the purchaser at execution sale of the four hundred and twenty acres under a judgment foreclosing the Bartlett lien."

Upon the motion for rehearing, the court of civil appeals added the following to its finding of fact: "It is further insisted that we were in error in the conclusion that the evidence did not tend to show a loan by Jones to Chapman, but only a sale from Chapman to Jones. We have concluded to modify this finding, and now hold that the testimony of Jones was such as to raise that issue, but need not decide whether the evidence would have warranted a finding that merely a loan and not a sale was made."

The plaintiff in error claims that there is no evidence to support the finding of the court of civil appeals that there was a partnership formed between Spencer and Chapman in the purchase of the land from Bartlett and its sale for profit. This contention is based upon the following propositions: 1. That there is no evidence to prove the contract of partnership between Spencer and Chapman; 2. That the contract, when proved, does not establish a partnership.

We are of opinion that there is evidence sufficient to support the finding of the court of civil appeals, and that this court cannot say, as a matter of law, that the evidence produced does not show that Chapman and Spencer intended to form a partnership in the transaction in question.

Upon the second point, the plaintiff in error cites the case of *Clark v. Sidway*, 142 U. S. 682. It is claimed that the case cited holds that no partnership can exist in a single transaction of purchasing land with a view of selling it for profit. In the case cited, the court does not hold that a partnership may not exist in one transaction, but simply holds that in that one transaction there was no partnership. The authorities are abundant to the effect that a partnership may, according to the intention of the parties, be formed for the purpose of one transaction alone in real estate; that is, the buying of one tract or more of land at the same time and selling them for profit: *Yeoman v. Lasley*, 40 Ohio St. 190; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Winstanley v. Gleryre*, 146 Ill. 27; *Canada v. Barksdale*, 76 Va. 899; *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Simpson v. Tenney*, 41 Kan. 561; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *Hunter v. Whitehead*, 42 Mo. 524; *Pennybacker v. Leary*, 65 Iowa, 220. As a matter of law, such partnerships may be formed, but whether they exist is a question of fact, to be determined from the evidence. In the further examination of the

question, Spencer will be regarded as a partner with Chapman in the buying and selling of the land from Z. Bartlett.

Granting that the division of the notes which Chapman's vendee gave for the purchase money of the land did not work a dissolution of the partnership between Chapman and Spencer, nevertheless, the division had the effect to separate the notes from the partnership effects, if any remained, and to convert the notes which were assigned to each party into his individual property: *Kendall v. Hackworth*, 66 Tex. 499; ⁵¹⁹ *Swearingen v. Bassett*, 65 Tex. 267. When Chapman indorsed the notes of Jones, they were the individual property of the former, and any representations by him to Jones were made on his own responsibility and not as the partner of Spencer, for, if the partnership still remained, the transaction between Chapman and Jones was one in which the partnership was not interested. It matters not that Chapman may have intended to apply the money received in the sale of his individual property to the payment of the partnership debt. This would not change his relation to Spencer in the sale and transfer of the notes, nor would it give to Jones any right or claim whatever against Spencer, either upon the indorsement of the notes or on account of the fraudulent representations which Chapman may have made to induce Jones to buy them.

The facts of this case did not warrant the court in rendering judgment subjecting the land to the lien of Jones' notes, which was subordinate to that under which Spencer bought, without taking into consideration Spencer's rights as the owner of other lands subject alike to the superior lien of the original purchase money notes. The effect of the judgment is to give to Jones, the indorsee of Chapman, as against Spencer, a greater right than Chapman himself was entitled to upon the face of his claim of title. For these errors, the judgments of the district court and court of civil appeals must be reversed.

Whether Spencer, the dormant partner in the real estate partnership, was liable to Bartlett on the purchase money note given by Chapman in the purchase of the tract of land is not involved in this case and is not decided, but that question is expressly left open for future consideration.

In view of another trial, we think it proper for us to say that, under the findings of the court of civil appeals, the relation of partners existed between Chapman and Spencer at the time the notes held by Chapman for the purchase money of the land sold by him were divided, and, as such partners, they had the right

to adjust their several interests, as they did by partition of the property and the assumption by Chapman of the Bartlett debt. If Jones knew at the time that he purchased the notes from Chapman that the latter had agreed with Spencer to pay the purchase money notes due to Bartlett, then Jones would hold the notes subject to the original lien. If, however, Jones had no such notice, he would not be affected by the secret agreement, but would take the interest of Chapman subject only to such rights of Spencer as appeared from the chain of title under which Chapman held the land.

It will greatly simplify the matter to discard all of the questions which arise out of facts that transpired antecedent to the partition of the property and to treat the case as if the land itself had been divided between Chapman and Spencer instead of the purchase money notes. Assuming that Jones had no actual notice of the agreement between Chapman and Spencer, and that Jones bought Chapman's portion of the land, he would be charged with notice of the recital of the notes for the purchase money and reservation of the lien contained in the deed from Bartlett to Chapman, ⁵²⁰ whether the deed was recorded or not, because that deed would be one of the links in his chain of title. Upon this state of facts, Jones and Spencer would hold their several tracts of land subject to the vendor's lien in favor of Bartlett.

Neither Jones nor Spencer was a party to the suit of Bartlett v. Chapman, in which the original vendor's lien was foreclosed, and neither of them was concluded by that judgment as to his rights in the land. When Spencer bought the land under the judgment of Bartlett v. Chapman, he took the title to it subject to the right of Jones to pay his part of the debt and discharge the land that he claimed under Chapman: *Ufford v. Wells*, 52 Tex. 612; *Foster v. Powers*, 64 Tex. 247; *St. Louis etc. Ry. Co. v. Whitaker*, 68 Tex. 634. If, under such state of facts, Jones were out of possession and suing Spencer for possession of the land, he could not recover without paying the latter that part of the original purchase money with which the land stood charged. Neither can Jones in this proceeding subject the land to his debt as a lien superior to the rights of Spencer, but in the adjustment of their rights the court must give Spencer protection to the extent that he has discharged the prior vendor's lien upon this tract of land.

The judgments of the district court and the court of civil appeals are reversed and the cause remanded.

PARTNERSHIP—SINGLE TRANSACTION.—A partnership may be formed for the purpose of dealing in lands by buying and selling them generally, or it may be limited to a speculation upon a single venture: *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133.

PARTNERSHIP—DISTRIBUTION OF ASSETS.—A going firm may make a bona fide distribution of the partnership funds among its members, or change them from joint to separate estate: *Allen v. Center Valley Co.*, 21 Conn. 130, 54 Am. Dec. 333. As to when partnership property becomes individual property, see *Thayer v. Humphrey*, 91 Wis. 276, 51 Am. St. Rep. 887.

PARTNERSHIP—INDORSING NEGOTIABLE PAPER—EFFECT ON PARTNER.—Where partners are sued as indorsers, the indorsement being made by one of the firm, his copartner is not liable unless shown to be a party to the contract: *Wilson v. Williams*, 14 Wend. 146, 28 Am. Dec. 518.

MORTGAGE LIEN—RIGHTS OF JUNIOR MORTGAGEE.—A junior mortgagee not made a party to foreclosure proceedings of a senior mortgagee, who has both actual and constructive notice of the rights of the former, may foreclose against the mortgagor, or redeem from the first mortgagee, or his assignee, or the purchaser at the foreclosure sale: *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514, and note; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364.

PARTNERSHIP—REAL PROPERTY—NOTICE.—Persons dealing with the members of a partnership have a right, in the absence of some notice or knowledge to the contrary, to assume that public records, showing certain real estate to be the individual property of the members of the firm, inform them correctly as to the ownership of the property, notwithstanding the private understanding between the partners themselves: *National Union Bank v. National etc. Bank*, 80 Md. 371, 45 Am. St. Rep. 350.

WHITE v. MCGREGOR.

[92 TEXAS, 566.]

DEEDS—REGISTRATION—NOTICE.—Registry of a deed is notice only to those who claim under or through the grantor.

DEEDS—REGISTRATION—SUBSEQUENT PURCHASERS. Under a statute declaring a deed not duly recorded void as against subsequent purchasers for value without notice, such purchasers are those only the origin of whose title is subsequent to the title of the grantee in the recorded deed.

DEEDS—REGISTRATION—NOTICE.—The registration of a sheriff's deed to the property of a certain person is not notice to a subsequent purchaser from one claiming title under a conveyance made by such person prior to the sheriff's sale and deed.

DEEDS—REGISTRATION—NOTICE OF FRAUD—PRESUMPTION.—A purchaser who buys land after registration of a sheriff's deed thereof, from one claiming under a conveyance made by the debtor prior to such sheriff's sale of his land, is not, in the absence of actual knowledge of the sheriff's sale and deed, put on inquiry, nor presumed to know that the sheriff's sale was made under a claim that such prior conveyance by the debtor was in fraud of his creditors.

Dickson & Moroney and W. H. Atwell, for the appellants.

Thomas & Turney, for the appellees.

⁵⁵⁶ GAINES, C. J. This was an action of trespass to try title brought by plaintiffs in error against defendants in error. The trial judge instructed a verdict for the plaintiffs, which was returned, and upon which judgment was accordingly rendered. Upon appeal, the court of civil appeals reversed that judgment and gave judgment for the defendants.

⁵⁵⁷ Both parties claim under John Crum as the common source of their respective titles. The plaintiffs' title is as follows: 1. Deed from John to Jane Dickerson, his mother, dated April 23, 1884, and recorded on the same day; 2. Deed from Jane Dickerson and her husband to Reuben Crum, dated October 28, 1888, and recorded two days thereafter; 3. Deed from Reuben Crum and wife to Aura V. White one of the plaintiffs, dated December 22, 1892, and recorded in December of the same year. The title of Mrs. McGregor is as follows: 1. A judgment of a justice court of Dallas county in favor of one Evans against John Crum for fifty-five dollars and seventy-five cents, rendered September 14, 1884; 2. Execution on the judgment and levy and sale by sheriff thereunder to Evans. The sale was made August 4, 1885, and the deed was executed and recorded the same day; 3. Devise by the will of Evans of the lands in controversy to Mrs. McGregor, who was his daughter.

According to the findings of the court of civil appeals, the conveyance by John Crum to Mrs. Dickerson, his mother, was made with the intent to defraud his creditors. On the other hand, they found that when Mrs. White purchased she paid value for the land without actual notice of any adverse claim. The deed to Mrs. Dickerson recited a consideration of two hundred dollars and that it was paid.

In determining the superiority of the respective titles, two questions present themselves: 1. Was the registration of the deed of the sheriff to Evans notice to Mrs. White, the plaintiff, of the existence of such deed? 2. And if so, should such constructive notice be deemed to give her notice also that the plaintiff in execution claimed that the deed from John Crum to his mother was fraudulent as to his creditors and therefore void?

The proposition is frequently announced that, under the registration laws, the proper record of an instrument authorized to be recorded is notice to all the world. Although the language of article 4652 of the Revised Statutes gives countenance to the

doctrine as thus broadly stated, it has been decided by this court that the proposition is subject to important qualifications. For example, in *Holmes v. Buckner*, 67 Tex. 107, the court quote with approval the following language: "The registry of a deed is notice only to those who claim through or under the grantee [grantor] by whom the deed was executed." The doctrine was applied in the decision of that case, and the decision has been followed in subsequent cases: *Lumpkin v. Adams*, 74 Tex. 96; *Jenkins v. Adams*, 71 Tex. 1; *Frank v. Heidenheimer*, 84 Tex. 642. So also it is held in other jurisdictions that the record of a deed or mortgage is notice to subsequent purchasers from the same grantor, but not to prior purchasers: *Doolittle v. Cook*, 75 Ill. 354; *Stuyvesant v. Hall*, 2 Barb. Ch. 151. In the case last cited, the court says: "The whole object of the recording acts is to protect subsequent purchasers and encumbrancers against previous deeds, mortgages, et cetera, which are not recorded; and to deprive the holder of the prior unregistered conveyance or mortgage of the right which his priority would have given him at the ⁵⁵⁸ common law. The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor, or mortgagor."

The decisions of our court above cited establish a rule of property, and we need not stop to inquire whether they are correct or not. The effect of the rule is to hold that practically article 4652 adds nothing to the law as it previously existed; and, in determining the questions before us, we are brought back to the construction of article 4640. As to the matter in hand, the substance of that article is to declare a deed not duly recorded void as against subsequent purchasers for value without notice; and the question arises, What is meant by subsequent purchasers? Do the words mean all persons who purchase the land after the deed is recorded, or only those who are subsequent in the chain of title? If a grantor conveys the same property twice, and the second grantee puts his deed upon record, is it notice to one who subsequently purchases from the first grantee? We think not. The record is not notice to the first grantee, for he is a prior purchaser. Nor do we think it was intended to be notice to anyone who should purchase from him. In other words, we think the subsequent purchasers who are meant are only those the origin of whose title is subsequent to the title of the grantee in the recorded deed. It was so held in the state of New York under a statute apparently similar to that of this

state: *Hooker v. Pierce*, 2 Hill, 650. The case is strikingly like the case before us. In that case, as in this, there was a conveyance by the person under whom both parties claimed. Subsequent thereto, the land was levied on as the property of the grantor by virtue of an execution against him, and was sold by the sheriff, who made a deed to the purchaser. The plaintiff, asserting title under the sheriff's deed, claimed that the prior conveyance by the defendant in execution was fraudulent as to his creditors and therefore void, and the defendant, who derived his title through the prior conveyance, claimed that he was a purchaser for value without notice of the sheriff's deed. The court held that, although the latter deed was on record when he purchased, it was not notice to him. The opinion was by Mr. Justice Cowan, who, in speaking for the court, says: "We think the case at bar is distinguishable from *Jackson v. Post*, 15 Wend. 588, in respect to the different character of the persons now claimed to be affected with notice, from those who were held to be affected in that case. There the persons held to be affected claimed under the common source of title by a grant, as we have noticed, subsequent to that under which their adversary claimed. And it is such subsequent purchasers alone to whom the registry acts extend. The language of these statutes, so far as they affect deeds, is that, unless recorded, such deeds shall be void as against subsequent purchasers. When recorded, therefore, they have been held to operate as notice to such persons. The object of all the registry acts, however expressed, is the same. They were intended to affect with notice such persons only as have reason to apprehend some transfer or encumbrance prior to their own, because none arising afterward ⁵⁵⁹ can, in its own nature, affect them. And after they have once, on a search instituted upon this principle, secured themselves against the imputation of notice, it follows that everyone coming into their place, by title derived from them, may insist on the same principle in respect to himself. It is a general rule that when once a man has granted away his right, anything which he can do or say shall never be received to affect another claiming under him." In *Jackson v. Post*, 15 Wend. 588, referred to in the opinion, there was a conveyance by one Merrick to his son, T. Merrick. Subsequently, the premises conveyed were levied upon under an execution against the grantor, and sold and conveyed by the sheriff as his property, the purchaser having actual notice of the deed to T. Merrick, which, however, was not then recorded. The sheriff's deed was first recorded, and then the deed to the

son was recorded. It was held that notwithstanding the fact that the sheriff's deed was recorded before the record of the prior conveyance, purchasers under the sheriff's deed after the registration of both were affected with notice of the first deed. It seems to us that both decisions are correct. There are statutes in some of the states which give validity to the instrument although it be a second conveyance from the same grantor, provided it be first registered. But the statute of this state has never received that construction, nor do we think it was ever intended to have such an effect. A purchaser is bound to take notice of a deed from the grantor of his grantor prior to that under which his grantor claims, although the latter may be recorded first—for the statute does not regard the order in which the deeds appear upon the registry. But when one takes a conveyance from another who holds under the first deed from his grantor, such purchaser is not bound to look further for a subsequent deed from that grantor, for the reason that such deed is out of the chain of title under which he buys.

But conceding, for the sake of the argument, that the statute affected Mrs. White with notice of the sheriff's deed, then the second question arises: Did she have constructive notice that the deed from John Crum to his mother was fraudulent as to creditors?

The argument in favor of the affirmative, presumably, is that the fact that the creditor, after the conveyance to the mother, had caused the land to be sold as the property of John Crum, suggests that he considered that conveyance fraudulent, and was, therefore, sufficient to incite inquiry on part of a prudent purchaser. To this it may be answered that this is not necessarily so, because, in point of fact, the creditor may have caused the sale for the reason that he was not aware that his debtor had made a previous conveyance. But conceding, for the sake of the argument, that there is a suggestion of fraud in the fact of the sheriff's sale, there would be much force in the contention of the defendants in error, provided it was shown that Mrs. White had actual notice of that sale. But she had no actual knowledge of the fact. If she had notice at all, it is the constructive notice of the statute. The effect of the statute of registration is to create a legal irrebuttable presumption on part of subsequent purchasers that they know of the existence of the duly recorded ⁵⁶⁰ deed. Now, to presume notice of the deed, and then from the face of it to presume that the land was sold by the sheriff because the prior deed of the defendant in execu-

tion was fraudulent, is to build one presumption upon another, which is never allowed. The decisions of our court are in accord with this view: *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *McLouth v. Hurt*, 51 Tex. 115; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626; *Word v. Box*, 66 Tex. 596.

Our conclusion is, that the plaintiff in error, Mrs. White, showed the better title, and therefore the judgment of the court of civil appeals is reversed and that of the district court is affirmed.

DEEDS—REGISTRATION—NOTICE.—Recording a deed is constructive notice to those only who claim through or under the grantor by whom the deed was executed: *Note to Davis v. Monroe*, 67 Am. St. Rep. 583. The deeds and mortgages on record only apply to that particular chain of title: *Note to Pyles v. Brown*, 69 Am. St. Rep. 798.

DEEDS—RECORDING—SUBSEQUENT PURCHASERS—ANTECEDENT RIGHTS.—The registration of a conveyance or encumbrance is constructive notice only to subsequent purchasers and encumbrancers: *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108. The record of a deed is notice only to those who are bound to search for it, including parties subsequently dealing with the land or concerned with its title, but antecedent rights are not generally affected by registration, and the record is not notice to the grantor in the deed: *Davis v. Monroe*, 187 Pa. St. 212, 67 Am. St. Rep. 581; *Corey v. Smalley*, 106 Mich. 257, 58 Am. St. Rep. 474.

BURNETT v. OECHSNER.

[92 TEXAS, 588.]

MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACTS OF SERVANT.—An act done by a servant within the scope of his general authority, in furtherance of the master's business and for the accomplishment of the object for which the servant is employed, renders the master liable, although such particular act was expressly forbidden by the master, and unlawful in itself.

MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.—If a servant in charge of his master's farm, with authority to keep hogs from trespassing thereon, first catches and then hauls some trespassing hogs, belonging to a third party, into another state, where he unloads them at a hog ranch belonging to the master, the latter is liable for such act of the servant, although it is unauthorized, because it is in the line of his employment, and in furtherance of the master's business.

Flood, Hughes & Foster, for the appellant.

S. H. Hodges and L. H. Mathis, for the appellee.

⁵⁸⁰ GAINES, C. J. In this case, a question is certified for our determination which is thus stated by the court of civil appeals for the second supreme judicial district:

"This suit was brought by the appellee against appellant Burnett to recover damages in the sum of one hundred and twenty-nine dollars for the alleged conversion of twenty-six hogs belonging to appellee, the suit originating in the justice court and being tried on appeal in the county court, resulting in a judgment there for one hundred and twenty-five dollars, from which this appeal is prosecuted. Upon conclusions noted, the judgment was affirmed in this court January 7, 1899, Hunter, J., dissenting, and the case is now pending before us on motion for rehearing.

"At the suggestion of appellant, in view of the dissent, we deem it proper to certify to your honors for decision, as provided in article 1043, the controlling question in the case, which is, whether, upon the facts below stated, appellant was liable for the acts of one Williams in penning and hauling the hogs from appellant's ranch in Wichita county, Texas, across Red river into the Indian Territory, a distance of about twenty-five miles, and unloading them there at appellant's hog ranch?

"Williams was in charge of appellant's farm in Wichita county, and was appellant's boss on the farm, but not on the hog ranch, and he had no express authority from appellant to haul the hogs from the farm to the ranch. The hogs, however, had frequently entered the farm inclosures, destroying and wasting more or less corn belonging to appellant, and had been several times penned at the instance of Williams, to prevent damage to the crops, who as often notified appellee of such facts, requesting him to take the hogs away, but though he did take them away, he did not keep them up, as was the custom of the neighborhood, but permitted them to run at large. Upon being informed by Williams that the hogs were eating up the corn, appellant instructed Williams to keep them out, but did not 'give him any special instructions further than to keep them out.' He did not tell him to keep them out if he had to kill them, but did tell him that if appellee did not keep his hogs out and if he (appellant) had to run after them like Williams had to do, he (appellant) would kill them. The inference from the facts proven was irresistible that Williams, in removing the hogs from the farm to the hog ranch, was doing it as a means of keeping them out of the farm inclosures, the means previously tried proving unavailing, and that he was not acting in his own interest, except

possibly to rid himself of the annoyance, but solely for the benefit of appellant.

"The question certified is whether, upon this state of case, Williams ⁵⁹⁰ was acting within the scope of his authority and in furtherance of appellant's business; the errors assigned to the rulings on the trial being probably well taken unless he was so acting within the scope of his authority, but otherwise not well taken: *Mechem on Agency*, sec. 740; *International etc. Ry. Co. v. Cooper*, 88 Tex. 607, and cases there reviewed.

"The dissenting view of Justice Hunter upon this question is thus stated by him: 'I am also of opinion that the special charges asked by appellant, Nos. 3 and 8, should have been given, and, therefore, I think the fifth and sixth assignments should be sustained, and that a new trial should have been granted, because the verdict of the jury was not sustained by the evidence. I base this last conclusion upon the ground that when Williams, Burnett's farm boss, loaded up the appellee's hogs and carried them out of the state into the Indian Territory, he committed a trespass by converting them to his own use, and that Burnett's orders to him to keep the hogs out of the field did not authorize him to do that unlawful and tortious act. It may be that his language would have authorized Williams to kill the hogs, and I believe that if Williams had killed them Burnett would have been liable, because he had, in effect, I think, expressly authorized him to do so. But a man cannot be convicted or held liable for one offense or tort committed by his servant which he did not advise or authorize, simply because he had authorized or advised him to commit some other one which was not committed. It is clear to me that the judgment in this case ought to be reversed, on the ground mainly that the agent, in carrying the hogs out of the state, acted beyond the scope of his authority and did an unlawful and tortious act, the authority for which could not be implied from the orders given by Burnett.'"

It being a matter of common knowledge that corn cannot be raised in a field to which hogs have access, we are of the opinion that the manager of the farm had implied authority to prevent their encroachment upon the crop. It was his duty to keep the hogs out of the field, provided it was practicable to do so with reasonable labor and expense and by lawful means: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902. It follows, as we think, that the act of Williams was within the scope of his employment, unless it be the law

that the servant is to be deemed to act in excess of his authority whenever he resorts to an illegal act to further the business intrusted to him by his master. But such is not the law: *International etc. Ry. Co. v. Cooper*, 88 Tex. 607. In the case cited, the court quote with approval the following propositions laid down in the case of the same appellant against Anderson, cited above: "To hold the master liable for the act of his servant, it is not necessary that the servant should have the authority to do the particular act. The act of the servant may be contrary to his express orders, and yet the master may be liable. But the act must be done within the scope of the general authority of the servant. It must be done in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. For the mode in which the servant performs the ⁵⁹¹ duty he is engaged to perform, if wrongful and to the injury of another, the master is liable, although he may have expressly forbidden the particular act."

As we deduce from the statement accompanying the question, the court of civil appeals find in effect as facts that Williams removed the hogs for the purpose of keeping them out of the field, and that in doing so he was acting solely in the interest of his employer. Such being the facts, we are of opinion that in legal contemplation he acted within the scope of his authority and in furtherance of appellant's business. Our opinion will be so certified.

MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACTS OF SERVANT.—A master is liable for the willful and wrongful act of his servant directly within the scope of his employment, though not sanctioned nor ratified by the master: *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99. When a servant performs the duty for which he is engaged in a wrongful manner, and to the injury of another, the master is liable, although he may have expressly forbidden the particular act: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902, and note; *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 27 Am. St. Rep. 223; *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361, and note.

HUTCHESON v. STORRIE.

[92 TEXAS, 685.]

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONSTITUTIONAL LAW.—A provision in a city charter authorizing the improvement of streets at the cost of abutting property, in proportion to frontage, without regard to special benefits to the property, is unconstitutional and void.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONSTITUTIONAL LAW.—The state legislature cannot authorize a municipal corporation to assess upon abutting property the cost of street improvement or public improvements in a sum materially exceeding the special benefits which that property may derive from the work.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONSTITUTIONAL LAW.—The state legislature cannot authorize a municipal corporation to assess upon abutting property the cost of street or public improvement, without regard to benefits derived, and make such assessment conclusive upon the owner without an opportunity to contest the question of benefits. Such an assessment is null and void as a whole, and not merely as to so much thereof as may be shown to be in excess of the benefits received.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT—ESTOPPEL.—A person owning property abutting upon a street is not estopped to deny the validity of an assessment for street improvements, when such assessment is made without any fair opportunity given to such owner to contest its correctness.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENT—ESTOPPEL.—The failure of a person who owns property abutting on a street to appear when opportunity is afforded to contest the validity of an assessment for street improvement, in default of which a statute provides that he shall be estopped from contesting the validity of such assessment, does not estop him from showing that it is invalid, because the statute authorizing it is unconstitutional in this, that it authorizes such assessment in a sum materially exceeding the special benefits which such property can derive from the improvement.

CONSTITUTIONAL LAW.—STATUTES CANNOT VALIDATE BY ESTOPPEL an act that they are forbidden by the state constitution to authorize.

MUNICIPAL CORPORATIONS—INVALID STREET ASSESSMENT—BENEFIT TO LOTS.—If a statute provides that if, for any reason, recovery for street improvement cannot be had in accordance with the assessment made on the front foot rule, it may be allowed according to the standard of benefits to the lot assessed, an abutting property owner is not required to enter into the question of benefits in order to defend against an invalid assessment under the front foot rule.

Hutcheson, Campbell & Myer, for the appellants.

Ewing & Ring, for the appellee.

⁶⁸⁹ BROWN, A. J. We omit many of the facts of this case which are immaterial in considering the questions presented to this court. The following are the material facts:

Bettie M. Hutcheson, wife of J. C. Hutcheson, owned in her separate right a block of land containing about twenty acres fronting six hundred and forty-seven feet on the north side of the Harrisburg road and some other lots upon the said road—all lying within the limits of the city of Houston between the International & Great Northern Railroad and the corporate line of the city.

At a meeting of the city council of the city of Houston, held on August 13, 1894, the council adopted a resolution declaring that the improvement of the Harrisburg road from the International & Great Northern Railroad tracks to the city limits was a public necessity. The resolution stated the different kinds of material of which the improvement might be made, and directed that bids for the work be solicited. The third section of the resolution is in the following language: "The cost of constructing said improvements, except as to street intersections, together with the cost of collecting thereof, shall, as provided in section 24 of the charter of said city, be wholly defrayed by the owner ⁶⁹⁰ of the lot or lots, block or blocks, or tracts of land when not divided into lots or blocks abutting on said portion of said streets or avenues to be so improved, and said improvements shall be paid for in five equal annual instalments." The resolution was published as required by the provisions of the charter, and the city engineer made specifications for the work, which were approved by the city council, and, after due advertisement, the city council entered into a contract with R. C. Storrie to make the improvement ordered.

The city engineer, in accordance with the terms of the charter, made and filed a roll of ownership upon which the property of Mrs. Hutcheson was placed, and the cost of the improvement, according to the contract, was apportioned to the said property by the front foot thereof, as required by the charter to be done. The roll of ownership thus made out was filed with the secretary of the city, who gave notice of its filing, as required by the charter, and there being no objection presented on the part of Mrs. Hutcheson, it was approved by the council and improvement certificates were ordered to be issued to R. C. Storrie for the cost of the work, when approved by the board of public works. R. C. Storrie did the work according to the contract, and the improvement certificates were issued, and delivered to

him. Mrs. Hutcheson having failed to pay the instalments, this suit was filed to enforce their collection, and the district court entered judgment foreclosing a lien upon the property for the amount assessed, except the correction of some errors.

Mrs. Hutcheson's property was situated in a part of the city of Houston where there were very few houses of any kind, and most of them small and of little value. Much of the property in that vicinity was used for pasturage, and there were no water mains or pipes, electric lights, or sewerage in that portion of the city. As to whether the value of the property was equal to the amount assessed upon it for the improvement, the testimony was conflicting and the issue not determined by the court of civil appeals. Mrs. Hutcheson offered evidence to show that there were no special benefits derived by her property from the improvements made, which was excluded by the court, and there was no evidence that such benefits did exist. The court of civil appeals affirmed the judgment of the district court, from which Mrs. Hutcheson and her husband have sued out this writ of error.

Plaintiffs in error present a number of objections to the judgment, all based upon the proposition that the charter of the city of Houston, in so far as it authorizes the city council to improve the streets at the cost of abutting property without regard to special benefits to the property, is violative of sections 17 and 19 of the constitution of this state, which read as follows:

"Sec. 17. No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."

"Sec. 19. No citizen of this state shall be deprived of life, liberty, ⁶⁹¹ property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Also, that it is in conflict with the following provision of section 1 of the fourteenth amendment to the constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The court of civil appeals followed strictly the case of *Adams v. Fisher*, 75 Tex. 657, in which Judge Stayton said: "The charter of the city of Galveston gives to its council the legislative power to determine whether such an improvement will be for the public interest, and also to determine whether it will be of

such benefit to property fronting on that particular street to be improved as will justify the imposition of a part of the costs of the improvement on the owners of such property, and its determination of this question must be deemed conclusive," and in support of the opinion Judge Stayton quoted from *Ludlow v. Cincinnati etc. Ry. Co.*, 78 Ky. 360, as follows: "While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that an actual enhancement in value or other benefit to the owner be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement and of the question of benefit to the owners of abutting property." In that opinion this court followed the great weight of authority by which this extraordinary power has been sustained with remarkable unanimity. But in the case of *Norwood v. Baker*, 172 U. S. 269, recently decided by the supreme court of the United States, the rule announced in *Adams v. Fisher*, 75 Tex. 657, has been completely overturned and all precedents establishing it have been set aside. We recognize the binding force of the decision of the supreme court of the United States upon this question, but we the more readily apply it because we indorse it as a timely and just announcement of the superiority of a constitutional guaranty over a rule of law established by the courts. We feel some satisfaction also in the fact that the constitution of this state provides with equal fullness for the protection of the rights of property under such circumstances as does the constitution of the United States, and, if the action now undergoing investigation is violative of the constitution of the United States, it is more palpably a violation of the plainer provisions of the constitution of the state of Texas.

The first question is, What scope are we to give to the case of *Norwood v. Baker*, 172 U. S. 269, as authority in the decision of this case? Counsel for Storrie have presented an able and ingenious argument in which they endeavor to limit *Norwood v. Baker*, 172 U. S. 269, by contrasting it with previous decisions of the same court, and by ascribing to the former decisions superiority, they seek to eliminate from the later case every point which contradicts a former decision. It is claimed that because the court says ⁶⁰² *Norwood v. Baker*, 172 U. S. 269, is not in conflict with the former decisions, that court did not intend to decide that which is in fact in conflict. The more reasonable

conclusion is, that the court did not understand the former cases to embrace the grounds upon which the latter case rests. The case mainly relied upon for this purpose is *Parsons v. District of Columbia*, 170 U. S. 45, in which the assessment was made by an act of Congress, while in the case of *Norwood v. Baker*, 172 U. S. 269, it was made by a municipal corporation under an act of the legislature. In the former case, the court distinguishes the two classes in the following language: "There is a wide difference between a tax or assessment prescribed by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment, and the action of mere functionaries whose authority is derived from municipal ordinances." The distinction drawn may not be sound, but the statement shows that the question decided in *Norwood v. Baker*, 172 U. S. 269, was not determined in the case relied upon.

Norwood v. Baker, 172 U. S. 269, establishes the following propositions which are applicable to the case at bar:

1. The legislature of a state cannot authorize a municipal corporation to assess upon abutting property the cost of a public improvement in a sum materially exceeding the special benefits which that property may derive from the work. The court said: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation." It has been uniformly held that such assessments rest upon the grounds that the benefits conferred are equal to the demands made upon the property, but the courts, in applying the law to the particular cases, have heretofore ignored the principle upon which the authority rests, and have held that the exercise of the power will be upheld although the facts out of which it arises do not exist, and that benefits will be presumed to equal the assessment.

2. The legislature of a state cannot confer upon a municipal corporation the authority to make such assessment conclusive upon the owner without giving an opportunity to contest the question of benefits. Upon that point the court said: "As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and there-

fore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of public improvement, irrespective of any peculiar benefit ⁶⁹³ accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received." If the law under which the assessment in controversy in this suit was made did not afford to the property owner a fair opportunity to contest the correctness of the assessment made upon her property, she was not estopped to deny its validity.

3. In *Norwood v. Baker*, 172 U. S. 269, the supreme court of the United States laid down the rule that because the assessment was made under a law that did not afford property owners the opportunity to be heard nor empower the city authorities to consider the question of benefits, the assessment in that case was a nullity. Upon this proposition that honorable court said: "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question because the plaintiff did not show nor offer to show proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had shown an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred

in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specified sum representing such costs, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

From the record, it appears that in determining the amount to be assessed against the property of Mrs. Hutcheson, neither the city council nor the municipal officers considered the question of special benefits which might accrue to the land from the work; but proceeded upon the basis of the cost of the improvement to determine the amount. It follows that the assessment is void unless Mrs. Hutcheson is estopped ⁶⁹⁴ to set up the defense by a failure to enter a protest against the proceeding and to sue out an injunction against the council.

The charter of the city of Houston confers upon the city council full authority and control over its streets and alleys, and empowers the council to determine what street or portion of any street shall be improved, and whether the cost of such improvement shall be paid by the city in whole or in part, or by the owners of the abutting property either in whole or in part. If the city council should determine to charge the cost or any portion of it upon the abutting property, then, by a two-thirds vote of all the aldermen, it must determine whether the improvement is necessary to the public interest. When these questions have been settled by the council, if it be decided that the cost of the improvement shall be paid by the owners of the abutting property, the charter provides that "the cost . . . shall be defrayed, in case of street improvements, by the owner or owners of the lot or lots, block or blocks, tracts of land, when not laid out into lots and blocks, abutting on such street or portion of street improved, according to the cost of work in front of the particular lot or block or tracts of land." The city council is also empowered to determine whether the work shall be paid for in money, bonds of the city, or improvement certificates, and to make a contract for it. After the contract has been made, it is the duty of the city engineer to make out a

roll of property abutting on the street to be improved, and to specify upon such roll, among other things, "the total cost, as ascertained and calculated by the city engineer of such improvements necessary to be borne by each and to be paid by each owner of such property as described in such roll." There is no discretion lodged with the city council in determining the assessment to be made upon the abutting property, but the charter absolutely fixes the rule by which the assessment is to be governed, and devolves upon the engineer the mere ministerial duty to ascertain by calculation what the work in front of the particular lot will cost, under the contract, according to specifications. The law prescribed the standard to be the cost of work done in front of the lot, the specifications showed the work to be performed, and the contract fixed the price. A calculation alone was necessary to ascertain the sum to be expressed on the roll. Neither the council nor the engineer could proceed upon any other basis than that expressed in the statute, for we must look alone to the charter for the powers to be exercised by these officials. If, however, there were room for doubt as to the rule by which the assessment is to be made, the charter would set that at rest, for in the next succeeding phrase of the same sentence is to be found the following provision: "And in case of sewerage or drainage improvements (the cost) shall be defrayed by the owner or owners of such lot or lots, block or blocks, or tracts of land when not laid out into lots or blocks, according to the proportionate benefits of the lots," et cetera. It is apparent that in the enactment of these provisions in the same section and in the same sentence, the distinction between the assessment of the cost and the assessment of the ⁶⁹⁵ value of benefits was present in the legislative mind, and that the rule of assessing for street improvements according to the cost of the work, without regard to benefits, was intentionally and distinctly applied to that class of work with the intention to exclude benefits. Up to this point in the procedure, there certainly could have been no departure from the rule expressed in the charter by the city council or any officer engaged in the execution of the powers conferred—special benefits could not have been considered; but it is claimed that the charter provides for a hearing before the council at which the rights of the parties might have been adjusted upon the basis of benefits, and that the plaintiffs in error are estopped to deny the validity of the assessment because they failed to call upon the council by petition to revise and correct the proceedings

and remedy the wrong. The question arises, Did the charter afford to Mrs. Hutcheson an opportunity to contest the mode of making the levy?

After the roll of ownership has been prepared by the city engineer and approved by the board of public works and by the city council, it must be filed with the secretary of the city, who is required to publish the following notice: "Persons owning property on (here insert the name of the street or streets, or description of portions of the same referred to in said roll, or a description of the territory or district to which the roll relates) are hereby notified that the roll of ownership showing the amount of the special assessment tax levied against the owners of property above referred to, to cover the cost of improvement made in accordance with the resolution of the city council relating to the same, adopted (here insert the date of the resolution), has been placed in the office of the city secretary for inspection, in order that all persons interested therein, or to be affected thereby, may have an opportunity of calling the attention of the city council to any errors or mistakes connected with such assessments levied against property owned by them, as shown in said rolls." The secretary is required to mail a copy of the notice to the postoffice address of the property owner. At any time within ten days after the first publication of the notice, the property owner may "by petition to the city council, filed with the city secretary, object to any such acts and proceedings and show wherein they have been or may be wronged or injured thereby, and to ask for a revision or correction of the same; and they shall be permitted, and it shall be their duty, before the final approval of such roll, to appear in person, or by agent or attorney, before said city council, and not thereafter at any time before any other tribunal, fraud and collusion, which was then unknown and could not by reasonable diligence have been ascertained, excepted, and apply for redress for such wrong or injury, and for the correction of such errors as they may point out and establish to the satisfaction of said council; nor shall any such roll be finally approved by the city council after filing of such petition by any person so affected or liable to be affected by said proceedings, until such petition shall have been heard and acted upon by the city council, although ⁶⁹⁶ it shall not be necessary to incorporate in the minutes of said city council its action thereon; and it shall be the duty of any person who may deem himself injured by the action or nonaction of the city council in reference to the matters contained in such

petition, within five days after the approval of such roll of ownership, to apply to the proper court for an injunction, based on the facts alleged in such petition, restraining further action on the part of the city officials, or any of them, in reference to the matter complained of in such petition, and to the extent of the petitioner's interest in the same; and neglect or failure so to do shall forever estop such petitioner and all parties claiming under him from denying the correctness of said roll or the regularity of all proceedings previously had in reference thereto, or the validity of the special tax therein assessed against the land owned by him."

The foregoing provision of the charter authorizes the property owner to call upon the city council to revise and correct errors committed in the proceeding had in assessing the cost of improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words, "revision and correction," mean that the council may be called upon to review that which had been done and to make the proceedings conform to the law: *Vinsant v. Knox*, 27 Ark. 272. The city council and the officers acting under the authority of the charter of the city of Houston having no power in the first instance to consider the question of benefits in fixing the amount to be charged against Mrs. Hutcheson's property, a revision and correction of the acts done could not give relief against the wrong complained of. In support of this conclusion, we call attention to the potent fact that the city had entered into a contract with Storrie for the performance of the work at a stipulated price, and with the agreement that he should be paid in improvement certificates which would hold a lien upon the property, before the amount of the assessment was ascertained. If the engineer, for instance, committed an error in estimating the cost of the work in front of Mrs. Hutcheson's property, then a revision and correction of that act by the council could be had and the wrong could be corrected, because the contract itself furnishes the data and the correction would accord with the contract. If, however, the council had changed the basis of the assessment against Mrs. Hutcheson's property from the cost of the work to that of benefits received by the property, whereby the amount assessed would be lessened, the contract would have been annulled. A construction should not be placed upon the language that would empower the city to destroy the contract without the consent of Storrie. The claim that, upon petition of Mrs. Hutcheson, the

council could have afforded relief from the unlawful exaction is wholly unsupported by the terms of the law and is in direct conflict with many of its provisions. The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements.

The authority conferred upon the court to issue an injunction restraining ⁶⁹⁷ the council from proceeding further is limited to "the facts alleged in the protest" and is no broader than that vested in the council. The court is simply empowered, by writ of injunction, to restrain the council from doing acts contrary to the charter and to correct any errors which that body might have corrected.

It is claimed that the jurisdiction of the court must be held to be broad enough to embrace the subject of estoppel provided for in the law; therefore the court by injunction could inquire into and correct anything done which affected the validity of the levy, but we think that the estoppel to question the "validity" of the tax must be construed to forbid the owner to set up such invalidity as might arise from a want of compliance with the terms of the charter and not such as might grow out of want of authority in the city to make the assessment. The right to apply to a court for injunction is, as above stated, expressly limited to the facts alleged in the petition to the council; the authority of the district court is revisory and confined to correcting the acts done by the council and city officers.

If the legislature had enacted in plain words that a failure to apply for injunction against a levy of the cost of improvement upon the property should estop the owner to deny the validity of such assessment, the law would be void, because the legislature could not validate by estoppel an act that it is forbidden by the constitution to authorize.

It is asserted that Mrs. Hutcheson might have had the question of benefits investigated in this suit and the assessment reduced so as not to exceed the special benefits received. The charter provides: "And at all times and in all proceedings in any court in which the validity of any special tax assessment that might have been laid under the charter of the city of Houston or amendments thereto, as shown by any roll of ownership, purporting to have been prepared by the city engineer in accordance with the provisions thereof, may be called in question, a recovery shall nevertheless be had in such suit for such sum as ought to have been assessed against the tract of land involved, according to the mode of apportionment, provided in

the law of said city applicable to such improvement, and if for any reason, in law or fact, such recovery cannot be had, then a recovery shall be allowed, quantum valebat, not exceeding the contract price for the improvement in front of the lot or lots, block or blocks, or tracts of land involved, according to the front foot rule or standard; and if for any reason, in law or fact, recovery cannot be had in either of the above modes, then recovery shall be allowed not exceeding the contract price, to the extent and according to the standard of benefits from the improvements in question to the lot or lots, block or blocks, or tracts of land involved."

The legislature attempted to secure contractors for this class of work against all contingencies and to authorize them, in case their contracts and the proceedings by virtue of which their claims arose were unenforceable, to recover nevertheless from the property owners upon one of the grounds named. It is unnecessary for us to determine ⁶⁹⁸ whether the legislature could effect such a purpose or not. The language does not purport to authorize the defendant in such proceedings to inaugurate the inquiry, and the construction would conflict with that part of the charter which declares that the property owner shall not do that thing. Substantially the same proposition was presented in the case of *Norwood v. Baker*, 172 U. S. 269, where it was contended that the party who sought the injunction in that case should have shown that the assessment was in excess of the benefits received, and that the court should have rendered judgment for the amount that the property was benefited by the improvement. In answer to this proposition, that court said: "This suggestion implies that, if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefit. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expense assessed upon the abutting property exceeded the special benefits. The as-

assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was, therefore, the only appropriate one." The quotation thoroughly refutes the contention made in this case and needs no argument to support it. It would be quite unusual to require the defendant in a suit, upon a demand wholly invalid, to furnish the plaintiff a valid cause of action as a condition precedent to defending himself against the unlawful claim.

If the charter of the city of Houston, under which the assessment in this case was made, could, by any fair and reasonable construction, be held to secure the property owner the right, at a time when it could be made effective, to contest the validity of the levy because not made upon the basis of benefits, it would be the duty of this court to so construe it. But, in order to justify such a construction, it should be so obvious that the property owner, upon a fair consideration of its provisions, would have known at the time of the proceeding that the remedy was afforded by the charter. If this court should force a construction of the charter which could not reasonably have been understood to be the meaning of the law at the time the acts were being performed, it would be not only judicial legislation but retroactive as well, which would be as unreasonable and arbitrary as the rule by which courts are required to conclusively presume that the city council has found the special benefits to be equal to the cost, when in fact there were no benefits and the council had no power to consider the question.

699 It is to be regretted that contractors and others may have been involved in financial loss by reason of an unconstitutional enactment of the legislative department, and courts will always preserve the rights of those who act in compliance with the law of the land, as far as it can be done lawfully, but the guaranties of the federal and state constitutions must not be subordinated to questions of finance nor sentiments of justice. Justice will be best preserved by upholding the limitations against the exercise of arbitrary power. When a law comes in conflict with the constitution of the United States or of the state of Texas, then the law must yield and the constitution be upheld and sustained.

We conclude that the assessment made in this case was void and that it gave no right against Mrs. Hutcheson, either of a personal nature or a lien upon her property, and that the pleadings and evidence conclusively show that no right of action can be shown. It is therefore ordered that the judgments of the

district court and court of civil appeals be reversed, and that judgment be here rendered for defendants, B. M. and J. C. Hutcheson.

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—CONSTITUTIONAL LAW.—A statute authorizing a city council to tax the lotowners abutting on a certain street between specified limits for two-thirds of the cost of improvements is unconstitutional and void: *Mauldin v. City Council*, 53 S. C. 285, 69 Am. St. Rep. 855. Property owners are not chargeable with the price of municipal improvements, but only with an equivalent for the special benefits they derive therefrom; and such equivalent cannot exceed the reasonable value of the improvement, and, hence, the municipality, and not the assessable property owners, must bear the excess of price beyond fair cost: *Wilson v. Trenton*, 61 N. J. L. 599, 68 Am. St. Rep. 714, and note thereto treating of this important question, that it is not within the power of a municipality or of a state to impose upon real property any burden or liability for the construction of public improvements adjacent thereto in excess of the benefit thereby added to, or conferred upon, such property.

MUNICIPAL CORPORATIONS—ASSESSMENTS BY FRONTAGE.—If the cost of a street improvement is directed by statute to be assessed against the lots chargeable therewith, in proportion to the benefit secured thereto, an assessment according to the frontage rule, and without any actual view or consideration by the officer making the assessment of the benefits actually accruing to each parcel by reason of the improvement, is invalid: *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926; *Violet v. Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825. On the general question of the apportionment of taxes and assessments, see the extended note to *People v. Brooklyn*, 55 Am. Dec. 288.

MUNICIPAL CORPORATIONS—ESTOPPEL.—The doctrine of estoppel cannot be applied as against a city, to validate a contract which it has no power to make: *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

BOLLN v. METCALF.

[6 WYOMING, 1.]

CONTRACTS—CONSIDERATION—SETTLEMENT OF ACTION—DURESS.—The settlement of an action, either begun or threatened, unless founded on a fraudulent or fictitious claim, is a valid consideration for promises by a third party to pay the claim, and the service, or threatened service, of an attachment in such action is not duress.

SURETYSHIP.—NOTES GIVEN BY A THIRD PERSON to one who is a surety upon the bond of a defaulting officer, to indemnify such surety must be held as indemnity for the benefit of a co-surety, equally with the payee named in the notes, and this although the latter intended such indemnity for his own exclusive benefit.

SURETYSHIP—NOTES AS INDEMNITY—AMOUNT OF RECOVERY.—If notes are given by a third person to one who is a surety on the bond of a defaulting officer, as indemnity to such surety, he is entitled to recover, in his own name, the full amount of such notes, although he and his co-surety together may have paid the amount of such defalcation in the discharge of their obligation under the bond.

JUDGMENTS AS EVIDENCE.—In the absence of fraud and collusion, a judgment is conclusive evidence, even against a stranger, of the relation of debtor and creditor between the parties thereto, and of the amount of the indebtedness.

SURETYSHIP—NOTES AS INDEMNITY—CONSIDERATION.—The maker of notes given to indemnify a surety on the bond of a defaulting officer, having been a mercantile partner of such officer, and the purpose in giving the notes being to save the partnership property from attachment in a suit by the surety against his principal, the questions whether an action had been commenced or a writ of attachment issued, and whether the defaulting officer had any real interest in the partnership property at the time when the notes were given, are immaterial as affecting the consideration for the notes, and are properly excluded from consideration by the jury.

H. Donzelmann, for the plaintiff in error.

G. Clark, for the defendant in error.

7 CONAWAY, J. This is an action brought in the district court by defendant in error on two promissory notes, the execution of which in his favor by plaintiff in error is admitted. The notes were executed under the following circumstances: One Charles Rastaetter was treasurer of school district No. 6 in Converse county, and defendant in error and John Schlichter were sureties on his bond. Rastaetter was, or had been, partner of plaintiff in error in a mercantile business. Shortly prior to April 7, 1890, Rastaetter absconded, and was defaulter in the funds of the school district to the amount of five hundred and forty-two dollars and eighty-two cents. The notes are of that date and for that amount—one for three hundred dollars at sixty days, and the other for two hundred and forty-two dollars and eighty-two cents at four months, both with interest at twelve per cent per annum from maturity.

At the time of the execution of the notes, defendant in error and Charles Schlichter, sureties of Rastaetter, were attempting to have an attachment served upon the interest or supposed interest of Rastaetter in the property of the partnership consisting of Rastaetter and plaintiff in error. Upon the execution of the notes these proceedings were discontinued. It is claimed that this suit in attachment, if commenced at all, was not in proper form, and that the notes were given without consideration and under duress; but it is immaterial whether the action was in proper form, or whether it was commenced at all, or not. The parties had a right to prosecute an action by attachment against Rastaetter to obtain indemnity as his sureties, and the alleged mistake in the form of action is immaterial. The settlement of an action, either begun or threatened, unless ⁸ it be founded on a fraudulent or fictitious claim, is a valid consideration for promises by a third party to pay the claim, and the service or threatened service of an attachment in such action is not duress of goods. So the defense of no consideration and of duress fails.

Defendant in error testifies that pending attachment proceedings he told Bolln, who wished to avoid the service of the attachment of the interest or supposed interest of the absconding partner, that, in order to discontinue the attachment suit, he (plaintiff in error) must have security. He further testifies that the notes sued on were given to indemnify him; that he

thereupon stopped the attachment proceedings and the suit against Rastaetter, and "this closed up the entire transaction." This portion of the testimony is not contradicted, and is relied upon by both parties.

At the time of the execution of the notes, the following written agreement was signed by defendant in error: "Whereas, George Bolln has, this seventh day of April, A. D. 1890, made two notes for the amount and sum of five hundred and forty-two dollars, being the amount claimed to be short by Charles Rastaetter as treasurer of school district No. 6. It being hereby agreed by the payee of said notes that if the said amount found to be due said district is less than aforesaid amount it shall be allowed and credited on said notes."

The defalcation was for the exact amount of the notes, and the sureties, defendant in error and Charles Schlichter, afterward paid a judgment for that amount against them and in favor of the school district. The security or indemnity, which defendant in error had obtained, was these notes of plaintiff in error for the exact amount of the defalcation of Rastaetter. And this security or indemnity was for the benefit of his cosurety, Charles Schlichter, equally with himself. Even if defendant in error intended this indemnity for his own benefit to the exclusion of his cosurety, the law will apply it for the benefit of both: 24 Am. & Eng. Ency. of Law, p. 815, subd. 7, note 3, ⁹ and authorities cited; Brandt on Suretyship, sec. 268; Harris on Subrogation, sec. 207.

This legal proposition is nowhere questioned or doubted by any authority, so far as we are advised, and it is not necessary to discuss the question, as there are no conflicting authorities to weigh. It is immaterial in what proportion the two sureties paid the defalcation. Equity will make the burden of payment and the benefit of the indemnity equal between them by contribution. And defendant in error could be fully indemnified by nothing less than the payment of the amount of the defalcation.

In our opinion, the judgment of the trial court should have been rendered in favor of defendant in error for the entire amount of the notes. It was for a less amount, but he has not appealed. The other party cannot complain that the amount of the judgment against him is too small. Judgment affirmed.

Justice Potter, having announced his disqualification to sit in the hearing of this cause, the other justices called in Judge Hayford of the second judicial district.

Hayford, D. J., concurs.

Groesbeck, C. J., dissents.

ON PETITION FOR REHEARING.

CONAWAY, J. It is urged that the majority of this court were in error in saying on the first hearing of this cause that the indemnity against loss obtained by Metcalf as surety for Charles Rastaetter was for the benefit of his cosurety equally with himself. It is urged that this rule applies only where the indemnity is furnished by the principal debtor, and not where it is furnished by a third party. It is true that a third party may indemnify one of several sureties to the exclusion of the cosureties. This is a right of the party furnishing the indemnity so to limit his liability. There is no lack of authority on the part of a cosurety to accept indemnity from a third party sufficient to secure all of the sureties against loss. The indemnity furnished in this ¹⁰ case was not a contract to hold one surety harmless. It was to pay so much money if the defalcation should not be found to be for a less amount. I am still of the opinion that such a contract is for the benefit of both sureties. The contract in this case was to pay an amount which proved to be the exact amount of the defalcation, which must have been known at the time of the execution of the contract. It is true defendant in error testifies that he took the notes to indemnify himself. That was, no doubt, his object. That was no obstacle in the way of his indemnifying his cosurety also. But this judgment should be sustained on another ground. It is actually for the amount necessary to indemnify defendant in error alone. If the condition of the contract can be construed as meaning that the defendant in error alone was indemnified, the judgment should still be sustained.

It is urged that there was error of law occurring at the trial in the admission in evidence of a former judgment against defendant in error and his cosurety, John Schlichter, in favor of the school district on account of the defalcation of Rastaetter. 12 American and English Encyclopedia of Law, page 84, is cited in support of this contention, but that authority seems not to sustain the point to which it is cited. It reads as follows: "As a rule, a judgment is not admissible in evidence against a stranger to the action in which it was rendered. An agent or attorney is not estopped by a judgment because he conducted the suit, nor is a witness bound by a judgment in which he testifies.

But, in the absence of fraud and collusion, a judgment is conclusive evidence, even against a stranger, of the relation of debtor and creditor between the parties thereto, and of the amount of the indebtedness." The amount of the indebtedness is the fact to be determined in the case at bar, not the validity of the former judgment. The limitation of this rule is stated in note 3, page 86: "Supposing such third persons were not bound with or for the parties found liable, the rule applies." And, further: "According to some authorities, the judgment is *prima facie* evidence ¹¹ in such cases." Bolln was not bound with or for Metcalf. He contracted directly with Metcalf.

A question has been raised as to the necessity of joining the cosurety, Schlichter, as party plaintiff in the action. This seems to be unnecessary in either view of the case. If the indemnity was for the benefit of Metcalf alone, he is the only party in interest, and the only one competent to sue. If for the benefit of Metcalf and Schlichter both, then Metcalf is a "person with whom or in whose name a contract is made for the benefit of another," and may sue alone: See Rev. Stats., sec. 2384.

At the time plaintiff in error executed the notes sued on, the sheriff of the county was proceeding to take possession of the goods in question by virtue of a writ of attachment against Rastaetter. It is urged that there was evidence tending to show that no such writ of attachment had been issued, and that no bond for the attachment had been filed, and that the suit in which the attachment was claimed to have been issued was not really commenced. It is urged that it was error to take this issue from the jury. If the consideration for the notes had been the forbearance to proceed under this particular writ, this would be plausible. But it would have been of small consequence to plaintiff in error to protect himself from this writ, and leave matters so that another would be immediately sued out and served on the goods. If any of the objections now urged to the writ are truthful, he could have made short work of that writ by raising those objections in a proper proceeding in the trial court, and without giving any notes or other indemnity to Rastaetter's sureties or either of them. But his object was to prevent the seizure of the goods by attachment. He testifies: "I gave these two notes to save my property from attachment." A decision that the particular writ which the sheriff held was invalid would not have accomplished this object. Plaintiff in error was evidently aware of this, and he accomplished his object in another way, by giving as indemnity the notes which he

now repudiates. It is ¹² claimed that, notwithstanding this indemnity, Metcalf or Schlichter might have commenced another action, and might have attached Rastaetter's interest in the goods. This is not conceded. It is negatived by the testimony of both parties. But it is not necessary to discuss this proposition. It was not done nor attempted. So plaintiff in error received the benefit he contracted for as the consideration of his notes. The court wisely took from the jury the irrelevant and perplexing questions raised as to the actual commencement of an action and the validity of the writ of attachment. It was immaterial whether an action had been commenced or a writ issued or not. Plaintiff in error now claims that Rastaetter had no interest in the goods—that Rastaetter absconded on the third day of April, and plaintiff in error, of his own motion, dissolved the partnership on the 5th. It may be well that he could so dissolve the partnership and proceed to close up the partnership business. But he could not so destroy Rastaetter's interest in the goods. That remained the same after the dissolution as before, and subject to the same proceedings on account of Rastaetter's liabilities. Plaintiff in error now testifies that Rastaetter had no interest in the partnership property on account of having received from the firm more than his interest amounted to. But all of this is immaterial. Plaintiff in error did not defend the goods which he claims were exclusively his own on this or any other ground now urged. He avoided all litigation by executing and delivering as indemnity the notes now sued on. And defendant in error, in consequence, lost his opportunity to establish, if he could, that Rastaetter had an interest subject to attachment. Here are two sufficient considerations for the notes. Bolln says: "I gave these two notes, for I did not know whether I would have to pay the notes or not." That is, at the time of promising to pay and accepting the consideration he did not intend to pay, and he now asks this court to aid him in completing the fraud. As to the material and controlling facts of this case, there is no ¹³ conflict of testimony. The trial court exercised a wise discretion in taking from the jury the decision of the case, cumbered as it was with a mass of irrelevant and confusing matter. The principal ground for a new trial now urged is that this matter should be submitted to a jury. In my opinion, it is a matter which on a new trial should be excluded from the evidence. If the amount of Rastaetter's defalcation had proved to be less than the amount of the notes, a corresponding amount was to be credited on the

notes. This contingency did not occur, and it is the only contingency under which a deduction from the amount of the notes is provided for.

The judgment of the district court is affirmed.

Rehearing denied.

Hayford, D. J., concurs.

MR. CHIEF JUSTICE GROESBECK dissented, on the grounds, first, that, it being clear and undisputed that the notes sued upon were executed and delivered for the purpose of indemnifying Metcalf, the payee named therein, from any loss that might accrue to him, and to him alone, as one of the sureties on the official bond of Rastaetter, as treasurer of a school district, and as the notes were not given for the purpose of indemnifying Schlichter, the co-surety of Metcalf, the latter could recover only the amount of his loss and payment due to the defalcation of such officer. As the evidence fails to show how much he was thus compelled to pay, the judgment is erroneous in not being for the amount actually necessary to indemnify him. The second ground of dissent is, that the notes in suit were executed to secure the release of an attachment levied upon the interest of Rastaetter in the former copartnership of Bolln and Rastaetter, and, under the writ, the sheriff levied upon the entire stock of goods, in order to get possession of the interest of Rastaetter. Bolln executed the notes in suit to free his business from this levy or threatened levy by the sheriff armed with the writ. Although the evidence is conflicting as to whether the levy was made, it makes little difference whether it was actually made, if it was threatened by the sheriff under the writ. "There was then a conflict of testimony upon this point of the commencement of the suit and the issuing of the attachment writ, and this matter should have been submitted to the jury, as the only possible consideration for the execution of the notes was the dismissal of the attachment suit to release the goods of Bolln, the maker of the notes, from attachment with those of his former copartner. No claim, however well founded, should be permitted to be enforced under the guise of a sham suit, and the process of the court should not be abused to secure the enforcement of a settlement of even an undisputed claim. However immaterial the informality of the proceedings were for attachment, there certainly was a question whether the suit was ever begun, and whether the defendant Bolln was coerced into executing the notes to prevent the seizure of his interest in the former copartnership, and the delay and consequent loss, and perhaps the destruction of his business, in case the levy was permitted to stand. As duress of goods and failure of consideration were pleaded, although not with such particularity as would perhaps be required if objection in proper form had been made to

the answer, under the testimony I have narrated, owing to the irreconcilable conflict between the witnesses, the jury under proper instructions should have been called upon to determine the disputed facts. . . . If these notes were obtained under the coercion of a pretended suit and a pretended levy, there was not only duress of goods, but a total failure of consideration: *Thurman v. Burt*, 53 Ill. 129; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *Collins v. Westbury*, 2 Bay, 211, 1 Am. Dec. 643. In not submitting these disputed questions of fact to the jury by proper instructions, the trial court invaded the province of the jury, and the cause should be reversed and remanded on this ground." The learned judge stated as his third ground of dissent that, in his opinion, neither Metcalf nor Schlichter, as sureties on the official bond, nor both of them, had any right to maintain an action in attachment against Rastaetter or his property as the partner of the defaulting officer for which they were sureties, and this because there was no debt then due arising from the fact that they, as sureties, had paid for the defalcation of their principal. In this connection Mr. Justice Groesbeck said: "The plaintiffs in the attachment suit assert both in their petition and affidavit for attachment that the debt was due, but fail to show that they, as sureties, had paid the same before bringing the suit; it further appears, from the allegation of their petition in the attachment suit, that they had not in fact paid, and this is substantiated by the evidence in this cause. In such case, no attachment lies on the ordinary grounds for an attachment for a past due debt. Their attachment proceedings could not be maintained, as, if the debt were not due, there are no grounds alleged in the affidavit of attachment therefor, and the writ was issued, if at all, by the clerk, and not by a court or judge thereof, who alone can issue the writ for a debt not due; and the debt was not due according to the showing of the plaintiffs. It is clear, then, that from either situation, even if the attachment proceedings were regular, and the suit was actually commenced, as to which there is a conflict of testimony, which should have been decided by the jury under proper instructions from the court, that the plaintiffs had no right to an attachment, and that, therefore, there was no valid attachment to release and no suit to dismiss, and consequently no consideration whatever for the notes; for it is manifest from the record that the settlement was obtained under stress of the attachment proceedings and levy. There is no evidence showing, or tending to show, that the settlement was the forbearance of a future suit by attachment; and all the evidence points conclusively to the fact that the settlement was made in order to release the goods from the actual or threatened and not from any future levy."

CONTRACTS—CONSIDERATION—FORBEARANCE TO SUE.—

A forbearance to sue, or a dismissal of a suit already begun, is a sufficient consideration for a promise: *Mascolo v. Montesanto*, 61

Conn. 50, 29 Am. St. Rep. 170; Polson v. Stewart. 167 Mass. 211, 57 Am. St. Rep. 452. But the dismissal of a suit palpably unjust forms no adequate consideration for a promise: Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355.

SURETYSHIP—INDEMNITY—RIGHT OF COSURETY.—A security taken by one of several sureties, bound by the same instrument, for his indemnity against loss, inures to the benefit of all, though it is received before any of them become liable, and without any agreement that the others shall participate in its benefits: Hoover v. Mowrer, 84 Iowa, 43, 35 Am. St. Rep. 293; Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361; extended note to Hall v. Cushman, 43 Am. Dec. 563. But in Moore v. Moore, 4 Hawks, 358, 15 Am. Dec. 523, it was held that indemnity taken by one surety cannot be reached by his cosureties to his prejudice, unless it was taken for their benefit, or in fraud of their rights.

JUDGMENTS—CONCLUSIVENESS TO ESTABLISH RELATION OF DEBTOR AND CREDITOR.—A judgment for a debt is, as between the judgment creditor and other creditors, conclusive to establish the relation of debtor and creditor and the justness and amount of the debt, and cannot be attacked except for fraud and collusion: Note to First Nat. Bank v. Huntington etc. Co., 56 Am. St. Rep. 883.

SANTOLINI v. STATE.

[6 WYOMING, 110.]

FORGERY—INFORMATION—SUFFICIENCY.—An information for forgery, describing the instrument forged according to its purport as a "bank check," if good and sufficient in other respects, is not rendered insufficient because it omits the name of the drawee bank.

FORGERY—INDICTMENT—SUFFICIENCY.—An information or indictment for forgery, or for uttering or passing forged paper, need not set out any indorsements thereon, to show the instrument to be of apparent legal efficacy. It is sufficient to charge that it is a forged writing, and was uttered or passed with knowledge of the forgery, and with intent to defraud.

FORGERY—INDORSEMENT OF CHECK.—If a bank check is in fact a forgery, it is immaterial that it was not properly indorsed so as to pass the title by mere delivery, as it is sufficient if the instrument forged bears such a resemblance to the document it is intended to represent as to effectually deceive.

FORGERY—EVIDENCE—VARIANCE.—There is no such variance between the name "G. W. Edwards," as averred in an information for forgery, and the name "G. W. Ewareeds," as signed to the alleged forged instrument, as to require the exclusion of the latter as inadmissible in evidence; but the effect of such variance is for the jury to determine, subject to the rule that if such names are not idem sonans, the variance is fatal.

FORGERY—VARIANCE IN NAMES.—The court, in forgery cases, may decide the matter of variance, when the names appearing in the indictment and those appearing in the alleged forged instrument are so nearly alike as to be clearly idem sonantes, and may also pass upon the question when there is an unmistakable vari-

ance, and in the latter case exclude the instrument from the jury or direct an acquittal.

FORGERY—INSTRUCTIONS AS TO VARIANCE.—Failure to instruct the jury that a variance between the name of the maker of a check as alleged in an indictment for forgery, and as signed to the check, is fatal if they are not *idem sonans*, is not reversible error, when no request is made for such instruction.

Mail & Chiles, for the plaintiff in error.

B. F. Fowler, attorney general, for the state.

115 GROESBECK, C. J. The plaintiff in error was convicted of the crime of forgery in the district court for Sweetwater county, and on October 12, 1894, was sentenced thereunder to be imprisoned in the penitentiary for the term of four years. The uttering of forged paper, knowing it to be forged, with intent to defraud, is denominated forgery by our statute, and is included in the statutory definition of the crime. The information, after laying the venue and alleging the time and place of the commission of the offense, charges that the defendant below "did feloniously pass, as true and genuine, a certain forged bank check purporting to be the check of G. W. Edwards, payable to the order of William Colbers, for the sum of forty-five dollars, he, the said Felice Santolini, at the time he passed said check, well knowing said check to be forged, with intent to defraud the said John Slaviero." A demurrer was filed to this information on the ground that the facts stated therein do not constitute an offense punishable by the laws of this state, and this demurrer was overruled. Forgery by our statute in general terms is the false making or altering of certain written instruments therein set out at length, including checks, drafts, bills of exchange, and promissory notes, with intent to damage or defraud some person, either natural or artificial, and also the uttering, publishing, or passing any of the said false instruments, knowing the same to be false, forged, or counterfeited, with the like intent to defraud: Rev. Stats., sec. 924. Our criminal code is very liberal in its provisions relating to the construction of indictments, the rules of which apply **116** by express statutory provisions to informations. An indictment or information is not invalidated by any defect or imperfection therein which does not tend to the prejudice of the substantial rights of the defendant, or by want of any allegation or averment of any matter not necessary to be proved, nor by any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged: Rev. Stats., sec. 3244; Sess. Laws 1890-

91, c. 59, sec. 13; Sess. Laws 1895, c. 123, sec. 13. "In any indictment (or information) for falsely making, altering, forging, printing, photographing, uttering, disposing of, or putting off any instrument, it shall be sufficient to set forth the purport and value thereof": Rev. Stats., sec. 3247. Under the rules of the common law, indictments for forgery must contain the tenor of the instrument, that is, the instrument verbatim is required to be set forth, except where it has been destroyed by the defendant or is maintained in his possession, and perhaps in other cases where the instrument cannot be produced and where there is no laches on the part of the prosecution, but in every case where the instrument is not set out in full, the reason for the omission is to be given. An exact copy is required under this rule, in order that the court might be able to determine on the face of the indictment whether the instrument is one the false making of which can constitute forgery: Clark's Criminal Procedure, 206; 2 Bishop's Criminal Procedure, 403. But in a recent case the allegations of an indictment similar to those of this information, omitting the name of the bank on which the check was drawn, and setting out the purport of the instrument only, were held good at the common law, as the instrument was designated as a "check," and stated the name of the drawer and payee, and the sum for which it was drawn; and the court held that it appeared to be drawn on some bank or banker as certainly as though the name thereof was given, for without a drawer the instrument could not be a check: State v. Curtis, 39 Minn. 357. The dissenting members of the court said that it was the universal ¹¹⁷ rule at common law in such an indictment to set out the writing "either" by its tenor or purport, so that it would appear, if true, to be of some legal efficacy, and in order that the court might see whether it falls within the act or law on which the prosecution is founded. The instrument was called a "check" in the indictment, but it was not alleged to have been drawn on anybody, and so the dissenting judges thought it had no legal efficacy and could not be subject to an indictment for forgery. They further state that it would be wise policy for the legislature to change the law as had been done in England, by providing that the instrument be described simply by the name by which it is usually known, as a note, bill of exchange, or check, without further description. At the common law, the indictment generally set forth the purport clause, which was followed by the tenor clause wherein the instrument or writing was set forth in haec verba; and the pleader

was cautioned to allege nothing more in the purport clause than the legal effect or designation of the instrument, in order to avoid a possible variance or repugnancy between the clauses. Our statute requires that the purport and value of the false writing to be set out, and this latter term is held not to be used in this connection in the sense of the worth of the instrument in money, but in the sense of the effect the instrument is intended to accomplish, and hence as the synonym of "effect" or "import": *Chidester v. State*, 25 Ohio St. 438. The rigid rules of the common-law pleading in criminal matters have been relaxed by Lord Campbell's act and kindred legislation in Great Britain, and our statute follows in the wake of British legislation on the subject.

The information is not bad for the reason that the name of the bank drawee is not stated. This point was not raised by counsel for plaintiff in error, as his contention was upon the other ground, that the check described in the information was not of legal efficacy without an indorsement, and could not be passed without such an indorsement. In forgery it was never necessary to set ¹¹⁸ forth the indorsement of the forged paper in the indictment as the indorsement is no part of the instrument: *Clark's Criminal Procedure*, 209, and cases cited; *Wharton's Criminal Pleading and Practice*, 180; *Wharton's Criminal Law*, 733. The early cases in Massachusetts, cited, clearly support this view: *Commonwealth v. Ward*, 2 Mass. 397; *Commonwealth v. Adams*, 7 Met. 50. In the last-cited case the defendant was indicted for uttering and publishing as true a certain forged promissory note, with intent to defraud the persons to whom it was passed, knowing the same to be forged. The defendant objected to the sufficiency of the note produced to support the indictment, and objected to its being given in evidence to the jury, on the ground of variance. The objection was overruled, and the note was permitted to go to the jury, who found the defendant guilty. The court said in review of the case: "In an indictment for forgery, it is necessary, undoubtedly, to set out truly the instrument alleged to be forged. And so it was done in the present indictment, unless the indorsement of the payee is considered as part of the note; and we are clearly of the opinion that it is not. The indorsement is evidence of the transfer of the note to the defendant, which was a new contract. This was matter of evidence in support of the allegation that the note was uttered with an intention to defraud the persons named in the indictment; but it is not necessary to set forth the man-

ner in which a party was intended to be defrauded." The uttering of a forged instrument is complete when offered, and it makes no difference whether it was then indorsed by the payee or not: *Smith v. State*, 20 Neb. 284, 288, 57 Am. Rep. 832. A promissory note which is forged may be uttered and published with knowledge of its character, and with intent to defraud, even where the name of the payee is left blank: *Harding v. State*, 54 Ind. 359. *Contra*, *Williams v. State*, 51 Ga. 535. An instrument falsely made with the intent to defraud is a forgery, although if it had been genuine, other steps must be taken before the instrument would be perfect: *Commonwealth v. Costello*, 120 Mass. 358. The accusation must show that the instrument ¹¹⁹ is one having some legal effect, but it is not necessary that it should be shown to be a perfect instrument: *Garmire v. State*, 104 Ind. 444; citing 2 *Bishop's Criminal Law*, sec. 536; *Reed v. State*, 28 Ind. 396.

No matter how defective may have been the forgery, it is enough if there be a possibility of fraud. Even though a bill could only be negotiated by the indorsement of two payees, the false making of the indorsement of one of them is a forgery: 1 *Wharton's Criminal Law*, 695, 742. The fact that no person is at the time legally in a situation to be defrauded is no defense if there is a possibility of fraud: 1 *Wharton's Criminal Law*, 714. The false writing must be such that it "might" injure another: *People v. Munroe*, 100 Cal. 664, 38 Am. St. Rep. 323. According to Mr. Bishop: "Forgery is the making of a false writing, which, if genuine, would apparently be of some legal efficacy." It does not seem from the authorities that it is necessary either in any indictment for forgery, or for uttering forged paper, or for passing the same, to set out any indorsements thereon, to show the instrument to be of apparent legal efficacy; it is sufficient to charge that it is a forged writing, was uttered or was passed with knowledge of the forgery, and with intent to defraud. The demurrer to the information and the motion in arrest of judgment were properly overruled.

2. The proof shows that the check was made payable to the order of William Colbers or to him, and purported to be indorsed by William Casber. The indorsement was not that of Casber, as his employer, C. W. Edwards, testifies. Colbers does not appear to be known. It is asserted that these facts make the instrument defective and of no legal efficacy, the payee of the check purporting to be one person and the indorser another; so that, notwithstanding the fact that the instrument was trans-

ferred by delivery, it could not be legally effective, and could deceive no person, but this seems to be the narrow view. A forgery might be so planned by an ingenious swindler as to bear all the appearance of genuineness, be correct in form, and yet be made intentionally so lacking in indorsements ¹²⁰ and strict legal validity as to be well calculated to deceive. It is sufficient if the instrument bears such a resemblance to the document it is intended to represent as to effectually deceive: *Garmire v. State*, 104 Ind. 444; *State v. Ferguson*, 35 La. Ann. 1042. The instrument being a forgery, it matters not that it was not properly indorsed as to pass title, with the parting of its possession. It was represented to be the check of Edwards, and it was not. The defendant must have known this, and the jury so found. It is fair to presume that the payee was a fictitious person, as he seems to be unknown, and as the indorsement was made in the name of another person. A negotiable instrument made payable to the order of a person obviously fictitious is payable to bearer: *Sess. Laws 1888*, c. 70, art. 2, c. 1, sec. 15. If so, this instrument would have been of real as well as of apparent legal efficacy if genuine, without any indorsement.

Even without the indorsement, the writing would have been held by Slaviero, to whom it was passed, for the money he advanced upon it, as against all but the true owner, if it were genuine. The indorsement may be proved to show the fraudulent intent, and, if that exists without proof of the proper indorsement, this is sufficient.

3. The check offered in evidence against the objection of the plaintiff in error appears to be signed "G. W. Ewareeds" instead of G. W. Edwards. It is claimed that this is a fatal variance, as the information does not allege any extrinsic facts showing that the instrument, although signed differently, was represented to be the check of Edwards.

The evidence, which was that of the prosecution alone, the defendant offering none in his behalf, shows that the plaintiff in error asserted that the check was that of Edwards, with whom he claimed to have had dealings, passed it to Slaviero as such, and obtained thereon the sum of sixteen dollars, with the understanding that the residue would be called for the next day. Edwards testified that the check was not his, that the signature appended to ¹²¹ it was not his signature, and that his name was misspelled. On cross-examination, he stated that the name signed to the check was not his name. The payee of the check, William Colbers, was not known to him, but William Casber was

his sheep foreman, and the indorsement of the name of the latter on the check was not the signature of Casber. The check was not presented for payment to the bank on which it was drawn, for the reason that Slaviero, to whom it was passed and who advanced money on it, ascertained some hours after he had taken it that it was not good. We do not think that the court should have excluded the check from the evidence. Edwards treated it as an attempted forgery of his name, until requested to spell the signature to the check, and Slaviero testifies that the name looked like that of Edwards. Had the court been requested to instruct the jury that, if the name were not *idem sonans* with Edwards, they should acquit, it would have been error not to give such an instruction: *State v. Warren*, 109 Mo. 430, 32 Am. St. Rep. 680. It would have been proper for the court to so charge the jury without any request, but the plaintiff in error cannot complain of the omission of such an instruction when he did not request it. It was, under the circumstances, a matter for the jury to pass upon, and, as they did so under general instructions as to evidence, it cannot be said that there was error in the verdict. The question is raised only upon the introduction of the check in evidence. The difference between the names is not so clear and marked as to render it a palpable variance as a matter of law to be determined by the court. It seems that the court may decide the matter of variance when the names are so nearly alike as to be clearly *idem sonantes*, and may also pass upon the question when there is an unmistakable variance and in the latter case exclude the instrument from the jury or direct an acquittal: *Clark's Criminal Procedure*, 343; *1 Bishop's New Criminal Procedure*, 688. The name to the check may have been written so obscurely as to deceive any person of ordinary prudence and observation, and the ¹²² resemblance between the names may have been so close as to lead the jury to believe that the variance could not have been detected only upon the closest scrutiny. In the case of *Abbott v. State*, 59 Ind. 70, a forged order was signed Elirere Lowtrheiser, and this signature was charged by apt averments in the indictment to have been represented to be the name of Ezra Loutzenheiser. The judgment was reversed on the ground that parol evidence could not be introduced to show that the signature was that of the latter person, because the characters could not be construed to constitute the name with which the defendant was charged as forging, and further because the writing did not purport to be signed by the latter and did not contain either his

Christian name or his surname. Here the initials of the names are the same. There are a great number of decisions bearing upon this question, some of which are cited in late works on criminal procedure: Clark's Criminal Procedure, 341; 1 Bishop's New Criminal Procedure, 688; *People v. Fick*, 89 Cal. 144; *Peete v. State*, 2 Lea, 513; *State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449; *Langdon v. People*, 133 Ill. 382; *Parker v. People*, 97 Ill. 32; *Commonwealth v. Warren*, 143 Mass. 568; *Commonwealth v. Gill*, 14 Gray, 400; *State v. Gryder*, 44 La. Ann. 962, 32 Am. St. Rep. 358. In many of these cases, a variance like the one presented here would not be deemed to be fatal. Such a variance must be material to the merits of the case or prejudicial to the defendant under the terms of our statute: Rev. Stats., 3245. We have merely a typewritten copy of the instrument before us, and cannot tell, therefore, what might have been determined by its inspection, whether the signature was so close a resemblance to the one attempted or not as would deceive a person of ordinary observation: *Hess v. State*, 5 Ohio, 8, 22 Am. Dec. 767; *Turpin v. State*, 19 Ohio St. 540. As the matter was properly submitted to the jury, and no instruction asked upon the point of variance, there appears to be no prejudicial error. The check before us does not appear to be payable to the order of anyone, but is made payable to William Colbers, ¹²³ omitting the words, "or order"; but we assume that this is a clerical error in the typewritten copy in the record, as counsel for plaintiff in error treats the writing as payable to the order of the person named, and raises no objection upon this point. We have therefore disregarded it, and express no opinion upon that matter. We have examined the case very carefully, owing to the fact that counsel for plaintiff in error has presented the case upon a very full brief, and, as the record shows, gratuitously. But we think that, although the information might have been framed so as to exclude any controversy, and the evidence presented in better shape, there was no prejudicial error. The judgment of the district court for Sweetwater county is therefore affirmed.

Conaway and Potter, JJ., concur.

FORGERY—INDICTMENT—SUFFICIENCY.—An indictment for forgery must set forth the instrument forged with literal accuracy, or show good cause for the omission to do so: *Luttrell v. State*, 85 Tenn. 232, 4 Am. St. Rep. 760; *State v. Potts*, 4 Halst. 26, 17 Am. Dec. 449.

FORGERY—INDICTMENT.—AN INDORSEMENT UPON A NOTE need not be set out in an indictment charging that the note

is forged: *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 767; *State v. Tutt*, 2 Bail. 44, 21 Am. Dec. 508; *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706. An indictment for forgery of a note need not set out any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of the instrument: *Perkins v. Commonwealth*, 7 Gratt. 651, 56 Am. Dec. 123.

FORGERY—WHAT SUBJECT TO.—An instrument, to be the subject of forgery, must, on the face of it, be good and valid for the purpose for which it is created: *Caffey v. State*, 36 Tex. Crim. Rep. 198, 61 Am. St. Rep. 841.

INSTRUCTIONS.—THE FAILURE TO GIVE an instruction when no request is made for it is not error: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, and note.

MOYER v. PRESTON.

[6 WYOMING, 303.]

WATERS AND WATERCOURSES—APPROPRIATION OF WATERS OF SPRING.—The waters of a spring, naturally flowing into and tributary to a river, must be considered as part of it for the purposes of appropriation of water.

WATERS AND WATERCOURSES—APPROPRIATION.—The right to the use of water for beneficial purposes depends upon a prior appropriation.

WATERS AND WATERCOURSES—APPROPRIATION, WHAT CONSTITUTES.—To constitute an appropriation there must exist not only an intent to take the water, but that intent must be accompanied or followed by some open, physical demonstration, and there must ultimately be an application to some beneficial use. The initial act must also be followed with reasonable diligence, and the purpose consummated without unnecessary delay in order that, by the doctrine of relation, the time of appropriation may relate to such initial proceeding.

WATERS AND WATERCOURSES — APPROPRIATION—LACK OF DILIGENCE.—If a person does two days' work during one year, in cleaning out a spring, to facilitate the flow of the waters thereof to a river, of which it is a tributary, and the next year does only one day's work in again cleaning out the spring, and in the year commences to build a dam and ditch necessary in the appropriation of the water, he shows a lack of diligence, and his appropriation, as to time, must depend upon the work done during the latter years, as the work done in the preceding years cannot be connected therewith.

WATERS AND WATERCOURSES — APPROPRIATION—NEGLECT TO FILE STATEMENT.—As against one who is in no better condition, the neglect to file a statement of the appropriation of water as required by statute is not fatal to an appropriation made in good faith.

APPELLATE PRACTICE—AUTHENTICATION OF BILL OF EXCEPTIONS.—The certificate of the clerk of court is necessary to properly authenticate a bill of exceptions brought into the record, either as an original or as a transcript thereof.

J. L. Stotts and N. K. Griggs, for the plaintiff in error.

T. Hooper and G. Clark, for the defendant in error.

³¹³ POTTER, J. Whether this action was one brought under the then existing statutory provisions or an adjudication of the priorities of rights to use water for beneficial purposes, or was purely a personal action brought by defendant in error to restrain plaintiff in error from unlawfully diverting the waters of a natural stream to the detriment of defendant in error, and for damages for a past diversion of such water, and incidentally a determination of the priorities between such parties, need not be determined. The amended petition is entitled as to parties the same as any ordinary civil action, but seems also to be entitled as provided by the statute of 1886, providing for an adjudication of water rights. An order of the court appears, fixing a day for hearing, and another referring the case for the taking of testimony, which indicate that it was then understood to be a statutory proceeding. It is clearly shown, however, that the parties to this cause were the only persons interested as appropriators from said stream, and it is apprehended by the court, which was apparently the understanding of counsel as well, that all the matters involved can be decided without any special reference to the precise character of the action, or any determination of that matter. The only possible question which would at all depend upon a decision concerning the nature of the ³¹⁴ action is the method and time of bringing the cause to this court, and we were led to understand on oral argument that any objection in that respect which was urged in the brief of counsel for defendant in error was not insisted upon. Although no motion was filed or presented to dismiss the proceedings in error, the point is made on behalf of defendant in error, that the record before us is not sufficiently authenticated to authorize a review of the judgment of the district court. This suggestion has not escaped the attention of the court, and our views thereon will be expressed before concluding this opinion; notwithstanding those views, however, we have concluded to discuss and dispose of the cause upon its merits, assuming for the time being, at least, that the document on file, purporting to constitute the record of the cause, is such record. We are the more inclined to such course for reasons which will sufficiently appear:

On or about August 19, 1886, one William J. McCrea surveyed the line of an irrigating ditch from Little Powder river, and on that day filed in the office of the county clerk, and ex-

officio register of deeds of Crook county, a statement of his claim to a water right, the water to be diverted by means of the ditch, the line for which had been thus surveyed. About the same time, or perhaps somewhat later, but clearly within sixty days thereafter, he commenced the construction of such ditch. The water was intended to be used in irrigating certain lands, some of which he had entered upon and improved as a homestead, and others had been filed upon under the desert land act. Connected with the ditch was a dam constructed across said stream. The work upon this dam and ditch was continued until further work was prevented by the winter, but some water was allowed to flow into the ditch during the fall of 1886. Early in the spring of 1887 work was resumed, and the ditch was finally completed in August or September of that year. In May or June of 1887 water was carried through the ditch as it then existed, and was used for irrigation. The ditch was ³¹⁵ three feet wide on the bottom and about four miles in length. The testimony of McCrea was to the effect that in 1887 he irrigated three hundred acres of land. Each year thereafter the ditch was used for the purpose intended, and water from the stream aforesaid, diverted thereby, was devoted to the irrigation and reclamation of lands lying under or adjacent to the ditch, and belonging to McCrea, until May, 1890, when James G. H. Preston, the defendant in error, became, by purchase, the owner of the McCrea lands, ditch, and water rights. In 1890 the plaintiff in error diverted the waters of said stream at a point about five miles above the headgate of the McCrea ditch, and this action was the result.

July 24, 1885, Charles A. Moyer settled upon and improved one hundred and sixty acres of land, which he subsequently entered as a pre-emption, and upon which he made final proof August 9, 1886, and thereafter received a patent from the government therefor. One Diefenderfer at the same time became a pre-emptor upon one hundred and sixty acres of land adjacent to Moyer's claim, his filing and final proof being made on the same days respectively as in the case of Moyer. He received a government patent for his land.

Little Powder river flowed in its regular channel through the lands of Moyer and Diefenderfer, and upon the land of the latter was located a spring, which was situated about two hundred yards from the main channel of said river. This spring was tributary to the river, and the waters of the spring formed a part of the source of the river; upon this point there appears to

be no dispute. In 1885 Moyer did one or two days' work in cleaning out the spring, and making a more defined channel for the flow of the waters therefrom to a point on the river, where a dam was afterward constructed by him. This work he states was done by him for the purpose and with the intention of appropriating the waters of the spring for the irrigation of his land. He did not apply the water to any such use either in 1885 or 1886, and during those years did nothing to consummate his said purpose, except as above stated, and ³¹⁶ in 1886 was occupied one day in again cleaning out the spring. In the spring of 1887 he commenced the construction of the dam across Little Powder river, which was at some point on Diefenderfer's land, completed the dam and also a ditch leading from the river, into which the water was turned on or about April 28, 1887, and about two acres of land were irrigated for one week. This ditch was, according to the testimony of Moyer, from two hundred to three hundred yards in length, although Mr. Diefenderfer testifies that it did not exceed seventy-five yards. Moyer did not use the water either in 1888 or 1889, his excuse being that irrigation was not required in those years, by reason of the natural moisture or rainfall; but in the year 1890 he used the water three or four weeks irrigating four or five acres of land. In 1888, the land of Diefenderfer was sold to Moyer. In 1886, but subsequent to the filing of the statement of the McCrea ditch, Moyer and Diefenderfer filed a statement of claim to water. Moyer filed no other statement until September 30, 1891, which was after the commencement of this suit; the latter statement was then filed in the office of the county clerk and also with the clerk of the district court. The above facts are, in our opinion, to be fairly gathered from the testimony.

Defendant in error, Preston, in his petition, alleged that his statement of water right was also filed with the clerk of the district court. No proof was offered as to that matter.

The trial court found that the appropriation of the defendant in error by means of the McCrea ditch was prior to the appropriation of the plaintiff in error, and it was adjudged that the former was entitled to the first right to the use of the waters of said stream to the extent of four and two-sevenths cubic feet per second of time, which, upon the basis of the standard adopted by the legislature, is sufficient to irrigate three hundred acres of land. The plaintiff in error was adjudged entitled to a second right to the use of the waters of said stream to the extent of

five-fourteenths ³¹⁷ of one cubic foot of water per second of time; and the said Moyer was perpetually enjoined by the decree from in any manner interfering with the use of the waters of Little Powder river by Preston and those claiming under him to the extent of the amount of water allowed to him by the decree, for the irrigation of the lands described in the petition. The costs were taxed against the plaintiff in error, but there was no finding or judgment as to damages.

The only grounds for the motion for new trial filed by plaintiff in error which are sufficiently definite to require consideration, and the only grounds relied upon in this court, are that the findings, judgment, and decision of the court are not sustained by the evidence, and are contrary to law.

The plaintiff in error claims the water: 1. As a riparian owner; and 2. By virtue of his having complied with the irrigation laws of this state, having filed a statement of his claim on September 30, 1891, with both the county clerk and clerk of court. Counsel for plaintiff in error state their position substantially as follows: That it was unnecessary for Moyer to file such statement in order for him to claim as a riparian owner, or under the law of 1875. That the only reason he did so, and the only benefit he could receive by so doing, was and is to be found in the laws of 1886, which declared that proof could not be made without the prior filing of the statement; and that hence, by virtue of the law, he was given a vested right to the water, and by virtue of the filing of his statement he was given the statutory right to introduce evidence of his right.

Moyer's right is claimed further, however, to the waters of the spring, because, as it is insisted, they were percolating waters and never flowed in a defined channel to the river until by his labor they were given such a channel; and it seems to be further contended that Moyer was the first appropriator of the water in point of time.

In view of the fact that Moyer himself, as well as all ³¹⁸ the other witnesses who speak upon that matter, testified that the waters of the spring did naturally flow into the river, and were tributary to it, the trial court was assuredly warranted in treating such waters as a part of the waters of the river, and we deem it unnecessary to further consider the proposition with reference to percolating waters.

It is insisted that the defendant in error could secure no rights by appropriation superior to the interests of the plaintiff in error as a riparian owner.

The common-law doctrine relating to the rights of a riparian proprietor in the water of a natural stream, and the use thereof, is unsuited to our requirements and necessities, and never obtained in Wyoming. So much only of the common law as may be applicable has been adopted in this jurisdiction. The doctrine invoked is inapplicable. A different principle better adapted to the material conditions of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation. Our statutes have repeatedly recognized this right, and the constitution of the state declares it. We incline strongly to the view expressed by the supreme court of Colorado, to the effect that such right and the obligation to protect it existed anterior to any legislation upon the subject: *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443. We esteem it unnecessary, if it would not indeed be superfluous, at this late day to enter into any elaborate discussion of the reasons which gave birth to this doctrine. It is the natural outgrowth of the conditions existing in this section of the country. The climate is dry; the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water to the land are few; and while the land contiguous to water, and so favorably located as to naturally derive any sort of advantage therefrom, is comparatively small in ³¹⁹ area, the remainder, which comprises by far the greater proportion of our land otherwise susceptible of cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessities of our conditions in this respect alone, to say nothing of the other beneficial uses, also important, to which water has been and may be applied, has compelled the recognition rather than the adoption of the law of prior appropriation.

The first section of the statute of 1875, which became section 1317 of the Revised Statutes of 1887, is invoked to sustain the claim of plaintiff in error to the water as a riparian owner. His original entry of the land was made while that law was in force, but, before his final proof, it was supplemented by the statute

of 1886, which expressly declared the existence of the right of prior appropriation. Section 1317 was as follows: "All persons who claim or hold a possessory right or title to any land or parcel of land within the boundaries of Wyoming Territory, when said claim is on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to use the water of said stream, creek, or river for the purpose of irrigation in making said claim available to the full extent of the soil for agricultural purposes." The contention is, that this statute was sufficient to authorize Moyer to claim the water in question as riparian owner. We entertain a contrary opinion. The statute does not recognize riparian interests. The section quoted above purports to grant the right to the use of the water of any stream, creek, or river for the irrigation of those lands, not only lying along the bank of any such stream, but as well those which are in the neighborhood thereof. The subsequent sections of the statute of 1875, however, render it reasonably certain that no rights by that act ³²⁰ were accorded to riparian owners as such; but that the same privileges were granted alike to the owners of land, whether the same was situated upon the margin of a stream or otherwise. It was provided that "when any person owning claims in such locality" did not possess sufficient fall of water to irrigate his land, or his farm or land "is too far removed from said stream," and "he has no water facilities on those lands," he should be entitled to a right of way for ditch purposes through the tracts of land lying above, or below him, or between him and the stream. It was further provided that whenever the volume of water in any such stream should not be sufficient to supply the continual wants of the entire country through which it passes, commissioners should be appointed to apportion the water "in a just and equitable proportion," and "with due regard to the equal rights of all." It must be apparent that if the same primary right was, under the provisions of that act, recognized or confirmed as to all lands in the locality or neighborhood of a natural stream, regardless of the fact whether or not they were upon the banks of or immediately contiguous to the stream, the matter of location alone would not have been of the slightest importance in the determination of the real or ultimate rights of the respective owners, as between themselves; but that some other factor must have entered into and determined such right. That other factor could only have been the actual use and application of the water to beneficial purposes. The requirement that the commissioners selected to

apportion the water should do so "with due regard to the legal rights of all" must have meant something; some actual right was recognized, which was not possessed in any equal manner by all owners alike. So far as the mere location of the land was concerned, the right was the same, limited only in quantity, perhaps, in respect to the amount of land owned or claimed. The other and actual or more important right to be considered in the apportionment of water must have been, and in our judgment was, attached to the use and ³²¹ application or appropriation of the water. This would not only have been unequal in quantity, but also as to time of appropriation; and we are of the opinion that the legal rights of all referred to were the rights secured by prior appropriation. A similar early statute in Colorado, from which our act of 1875 was evidently taken, received such a construction in that state, and it was held that it did not prevent the diversion of the water of one stream to irrigate lands lying adjacent to or in the locality of another: *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443. That decision, although rendered subsequently to the enactment of the law of 1875, and for that reason, perhaps, not binding upon this court, would be strongly persuasive. We are perfectly content, however, therewith. It is in accord with our own views. It is manifest that the principle recognized by the law of 1875 is the opposite of the common-law rule pertaining to riparian ownership.

This disposes of the reasons urged in behalf of the title of Moyer to the water as a riparian owner. In our judgment, he possessed no rights of that character. If he had any interest in the water superior to Preston, he must have acquired it by some prior actual appropriation. To constitute an appropriation, there must exist not only an intent to take the water, but that intent must be accompanied or followed by some open physical demonstration, and there must ultimately be an application to some beneficial use; the initial act must also be followed up with reasonable diligence, and the purpose consummated without unnecessary delay in order that, by the doctrine of relation, the time of appropriation may relate back to such initial proceeding. In the case of the McCrea ditch, the survey was made early in August, 1886, the work of construction was prosecuted with diligence until completion, followed by an immediate application of the water to beneficial uses, which application had been continued. Moyer, on the other hand, in 1885, which was about one year prior to the commencement of the McCrea ditch, performed about two days' ³²² work in cleaning out the spring on

the land of Diefenderfer and facilitating the flow of the waters thereof to the river; the intention which he testifies he then had to appropriate such waters was not indicated in that year, nor the following, by any other work except another day's labor in 1886 again cleaning the spring. The construction of the dam and ditch, neither of which work seems to have been extensive, which were necessary in the application of the water to the uses intended, was not commenced until the spring of 1887. There was in this respect palpably a lack of such diligence as is required in such matters. It is impossible by any doctrine of relation to connect the building of the dam, and excavation of the ditch, with the work performed upon the spring in 1885 and 1886. The appropriation of Moyer, therefore, as to time, depends entirely upon what was done in 1887, and his right becomes subordinate to the appropriation made by the predecessor of Preston to which he succeeded. Any other construction placed upon the acts of Moyer would do great violence to the principles underlying the appropriation of water.

On behalf of the plaintiff in error it is further urged that no statement of the McCrea ditch was filed in the office of the clerk of the district court. Such filing was alleged in the petition, all allegations of which were generally denied in the answer, and no proof of such filing was given in evidence. It is contended that the filing of such statement in the office of the clerk of court was a condition precedent to an appropriation. The legislature of the territory, by an act approved March 11, 1886, entitled, "An act to regulate the use of water for irrigation and for other purposes, and providing for settling the priority of rights thereto," enacted a system for the better regulation of the use of water. The act established water districts, and provided for the appointment of water commissioners whose duties were defined, chief among which was the supervision of the division of water of the streams of their respective districts among the several ³²³ ditches taking water from the same, according to the prior rights of each respectively. Provision was then made for the adjudication of water rights, jurisdiction of courts established, and the method of procedure defined. That act also embraced certain provisions for the making and preservation of a record of all ditches and water rights, including appropriations already made, as well as those which might be made thereafter. All persons interested in water rights already existing were given until September 1, 1886, to file a statement of such rights, under oath. Such statements were required to be

filed with the county clerk and the clerk of the district court. Section 13 of the act, embodied in the revision as section 1343, provided in substance that thereafter every person constructing any ditch for beneficial purposes, and intending to use or appropriate any water from any natural stream for such beneficial purposes, should, before the commencement of such construction, file a statement containing various specified particulars in the office of the county clerk and clerk of the district court of the proper county; and it was provided that "from the time of filing any such statement, water sufficient to fill such ditch or ditches, and to subserve the use or uses aforesaid, if a lawful and just use, shall be deemed and adjudged to be appropriated; provided, that nothing herein contained shall be permitted to interfere with a prior right to said water, or to any thereof; and provided further, that such person or persons or corporation shall, within sixty days next ensuing the filing of such statement, begin the actual construction of said ditch or ditches, and shall prosecute the work of construction thereof diligently and continuously to its completion; and, provided further, that the beginning of all necessary surveys of such ditch shall be construed as the beginning of said work of construction."

A subsequent section provided that in adjudication proceedings no person should be permitted to give or offer any evidence before the court until he should have filed a statement of claim in substance the same in all respects ³²⁴ as is required to be filed under the provisions of the act. The contemporary construction placed upon that statute, although the question was not presented to this court, we understand to have been that the act itself provided the penalty for the failure to file the required statements, viz., that in any adjudication of water rights evidence would not be received in behalf of any person until he had filed the statements. The object of these particular provisions was obviously the establishment and preservation of a record of water rights, which had become in many instances of great value. The section requiring such statements to be filed in the offices of the county clerk and clerk of court was repealed in 1888, and another provision substituted providing for the filing of the statements in the office only of the county clerk, who is ex-officio register of deeds. And in 1890, when this requirement was abrogated, and the whole matter was transferred to the office of the state engineer, where the primary records were to be kept, the section of the statute of 1886, fixing the penalty for the failure to file the statements, was repealed. The law of

1890 required the clerks of court to transfer to the office of the state engineer all certificates of county surveyors as to measurements of ditches which had been provided for under another statute of 1886, afterward repealed, but the act of 1890 made no disposition of the statements of owners which had been filed with the clerks of court.

Under the new system, after the determination of water rights upon any stream by the board of control, which has been established in pursuance of a constitutional provision, a certificate from the state engineer issued as evidence of the right possessed and adjudicated in favor of an appropriator was required to be recorded in the office of the county clerk. Thus, in the development of legislation respecting the matter of records, the county clerk's office, in which was and is preserved the records pertaining to the title to real estate as well as instruments affecting personal property in all cases where a record is provided for, is retained as the office of the ultimate record of water appropriations, ³²⁵ so far as concerns any county records. The idea of preserving a statement in the office of the clerk of court was early abandoned, as obviously unnecessary and subservient to no useful purpose. To file such a statement under the acts of 1886 and 1888, no previous application for a permit to initiate and complete an appropriation was required as is the case with the later legislation.

It was the act alone of the person interested in the appropriation, and it seems evident that the more important aim, if not the entire scope of the requirements in this regard, was that of notice and record. In this view it is extremely doubtful if the filing of the statements amounted to a condition precedent to an appropriation. In the absence thereof, as against a later appropriator, without notice, and having fully complied with such provisions and made his appropriation in good faith, it may be that the latter would be entitled to a priority of right, but as that question is not involved in this case, we do not decide it. Moyer had notice of the McCrea ditch; and he did not comply with the statute himself. True, in September, 1891, he filed a statement apparently pursuant to the statute of 1886, in both offices, but at that time the law neither required nor authorized such a proceeding. The McCrea statement was filed with the county clerk in August, 1886. The provision for filing the same with another officer having been repealed in 1888, and the express penalty for the failure to initiate such a record having been repealed in 1890, and no statement of the Moyer ditch

having been filed in either office, until after such repeals, we are of the opinion that as between these two ditches or appropriations, Moyer is in no position to complain of the lack of compliance by McCrea, the grantor of Preston, in the respect indicated.

As against one who, at least, is in no better condition, the neglect to file the statement with the clerk of court cannot be held as fatal to the appropriation otherwise made in good faith. The court would have had no authority to enforce the penalty as to evidence, as at the ³²⁶ time the case was brought, and the trial was had, the law which had provided such penalty was not in force.

For the reasons thus set forth we are of the opinion that the judgment should be affirmed. We have deemed it advisable, under the circumstances, to dispose of this case upon its merits; but we cannot entirely ignore the suggestion of counsel for defendant in error that the bill of exceptions contained in the record is not authenticated.

We are given to understand that the purpose was to bring into the record in this court the original bill, which is permissible under our statute. There is a paper forming a part of the supposed record which appears to be signed by the judge of the district court as a bill of exceptions; it is, however, devoid of any filing mark indicating that it ever came into the hands or the office of the clerk of that court. It is not authenticated by any sort of certificate of such clerk or by the seal of the court. The signature of the judge imparts vitality to a bill, and authorizes it to form a part of the record in the cause; when it has become such, it requires the certificate of the clerk of the court, who is the custodian of the records, to properly authenticate it as either the original or a transcript thereof. How is this court to know that any paper is one of the originals filed in the cause in the court below, unless that fact is certified to by the clerk? We may recognize the signature of the judge appended to a bill by reason of the personal familiarity of one or more of the justices composing this court with such signature, but we are not in a position to conclude that the paper thus seeming to be signed by the proper judge, was ever filed or ever became a part of the record, or is in the condition it was when signed, unless the same is authenticated by the officer whose duty it is to file and preserve the same. It is needless to say that no reflections are intended in this case. We are satisfied that counsel presents a paper which he believes, and doubtless knows to be the true and correct bill

as allowed by the court; but we mention the above by way of illustration. The knowledge of ³²⁷ counsel is not the knowledge of the court, and in the nature of the case cannot be. Although for what we consider excellent reasons we have preferred to make a disposition of this case upon its merits, we would have been compelled to hold, if it had become essential, that the record was not properly authenticated.

Judgment affirmed.

Groesbeck, C. J., and Conaway, J., concur.

WATERS—APPROPRIATION—TESTS.—Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose. The appropriation, intention of the appropriator, use, and beneficial purpose, are the tests which determine the rights acquired by the diversion of a stream: *Hague v. Nephi Irr. Co.*, 16 Utah, 421, 67 Am. St. Rep. 634. See the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799, on what constitutes an appropriation of water.

WATERS—APPROPRIATION—DILIGENCE.—On the question as to what constitutes sufficient diligence in the appropriation of water, see *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, and the monographic note thereto.

GRAND ISLAND & NORTHERN WYOMING RAILROAD COMPANY v. BAKER.

[6 WYOMING, 369.]

CONSTITUTIONAL LAW—LIMITATION UPON COUNTY INDEBTEDNESS.—Under the Wyoming constitution, if the indebtedness of a county has reached or exceeds two per cent on the assessed value of taxable property, such county is powerless to create any debt in excess of it for the current year, either with or without a submission of the matter to a vote of the people or their approval thereof.

CONSTITUTIONAL LAW—LIMITATIONS UPON COUNTY INDEBTEDNESS.—Under the Wyoming constitution, if the indebtedness of a county is less than two per cent of the assessed value of the taxable property therein, it cannot create any debt in excess of the taxes of the current year, without first submitting the question to a vote of the people, and thereby securing their approval, and with such approval the county is authorized to create the additional debt, if, together with existing indebtedness, it does not exceed such two per cent; but, the absolute limit of lawful indebtedness being reached, it cannot be exceeded in any event.

MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—SALARIES OF OFFICERS are within constitutional limitations upon the creation of county indebtedness.

MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—Within the meaning of constitutional limitations,

upon the creation of county indebtedness, no distinction exists between debts imposed by law and those voluntarily assumed, and it makes no difference whether the debts are incurred for necessary current expenses or not.

MUNICIPAL CORPORATIONS—LIMITATIONS UPON INDEBTEDNESS.—Bounties for the destruction of predatory wild animals, provided by statute, are within constitutional limitations upon the creation of county indebtedness.

JUDGMENTS AGAINST COUNTIES ARE CONCLUSIVE, as against collateral attack, upon the question of the validity of county debts upon which they are founded, both as concerns the county and a citizen or taxpayer thereof.

MUNICIPAL CORPORATIONS — LIMITATION ON INDEBTEDNESS.—PUBLIC DEBTS, to pay which a county is authorized to levy taxes in addition to the constitutional limit, upon the annual tax for county revenue, are not confined to bonded indebtedness, and may, but do not necessarily, include ordinary warrants and other lawfully issued evidences of indebtedness, and also judgments.

MUNICIPAL CORPORATIONS — LIMITATION ON INDEBTEDNESS—PUBLIC DEBT.—If a county's indebtedness is within the constitutional limitation, and in pursuance of law, and it creates a debt in excess of the current taxes by the consent and approval of the people, which, together with existing indebtedness, does not exceed the amount within which it may lawfully become indebted, such debt is not only legal, but, although it may be evidenced alone by warrants, constitutes a part of the public debt, and to pay it a tax is permissible.

MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—In case warrants, or other evidences of indebtedness, are issued by a county for ordinary current expenses in excess of the taxes for the current year, without the consent or approval of the people, or in case the maximum constitutional limit of indebtedness has been reached, then such indebtedness is not a part of the public debt, and no tax can be levied to pay it, although it has been reduced to judgment.

MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—JUDGMENTS.—In determining the power of a county, under constitutional limitations, to levy taxes to pay judgments against the county, the latter partake of the character of and are governed by the same rules as to validity as the original claims upon which they are based.

MUNICIPAL CORPORATIONS — LIMITATION ON INDEBTEDNESS — JUDGMENTS—CONSTITUTIONAL LAW.—A statute requiring a judgment against a county to be paid by taxes does not contemplate nor include a tax in excess of constitutional limitations.

MUNICIPAL CORPORATIONS—LIMITATION ON TAXATION FOR INDEBTEDNESS — SALARIES OF OFFICERS—BOUNTIES.—A tax to raise a fund to pay salaries of county officers, and valid bounties for the destruction of predatory wild animals, in excess of the constitutional limit for county revenue, and creating an indebtedness in excess of the constitutional limit, is unauthorized and invalid.

MUNICIPAL CORPORATIONS—LIMITATION ON TAXATION AND INDEBTEDNESS.—A TAX LEVY FOR COURT EXPENSES by a county, in excess and exclusive of the constitutional

limit upon the annual tax for county revenue, is unauthorized and void.

MUNICIPAL CORPORATIONS—LIMITATION ON TAXATION AND INDEBTEDNESS.—Judgments in favor of a landowner for damages as compensation for the exercise of the right of eminent domain in constructing and opening a public road through his land, are payable out of the ordinary county revenue, and a tax levy to pay such a judgment in excess of the constitutional limit upon the annual tax for county revenue, is unauthorized and void.

JUDGMENTS BY CONFESSION.—A board of county commissioners cannot confess judgment against the county, nor authorize an attorney so to do, without pleadings and a hearing on their behalf.

Burke & Fowler and N. K. Griggs, for the plaintiff.

J. L. Stotts, county attorney, and M. Nichols, for the defendant.

C. B. Bradley, *amicus curiae*.

375 POTTER, J. Plaintiff filed its petition in the district court for Crook county, praying for an injunction against the collection of a portion of the taxes levied in that county for the year of 1895. A demurrer was interposed, and upon the hearing thereof the court ordered the cause to be reserved to this court for its opinion upon certain questions certified to be important and difficult.

In the year of 1895 the board of county commissioners of the county of Crook levied the following taxes: General revenue, ten mills; general county school, two mills; judgment tax, three and one-quarter mills; courthouse and jail bonds, two mills; funding bonds, two and one-half mills; amounting in the aggregate to nineteen and three-quarter mills on the dollar. The only part of the levy complained of in this action is the judgment tax of three and one-quarter mills, which is assumed to have been levied to pay certain judgments rendered against the county. The facts connected with the judgments are not, as the pleadings now stand, sufficiently disclosed to definitely indicate the precise nature of the claims entering into them. We are not informed by the pleadings, either as to the time when, or the court wherein, such judgments were secured. Inferentially, it may appear that they were obtained since the admission of the state, and largely upon warrants issued in payment for current expenses of the county since the adoption of the constitution. Indeed, the argument in this court was largely confined to the effect of judgments rendered upon warrants so issued and the taxing power associated therewith, although the suggestion was ad-

vanced by counsel that for all which ³⁷⁶ appeared in the pleadings, funding bonds might have constituted the source of the judgments.

It would seem that no necessity exists for dispute upon the essential facts. It would have been more satisfactory, therefore, and would, perhaps, have narrowed the scope of our investigation, had the issues been fully made up, prior to the reservation to this court, so as to clearly and without cavil present the questions submitted by the learned court for our consideration.

It is not our duty, however, to pass upon the demurrer. Our jurisdiction is limited to a decision upon the certified questions, and we are not requested thereby to direct the ruling which should be made upon the present condition of the pleadings.

The judgment tax is charged to have been illegal and void, and levied without authority; that the same was not levied for the payment of the public debt of the county or the interest thereon; and the county had exhausted its power to levy taxes for general revenue purposes by a levy of the constitutional limit of twelve mills for such purposes in the year 1895, and each year theretofore since the organization of the state. It is attempted, also, to attack the judgments upon two grounds: 1. That the alleged debts upon which they were obtained were void, as having been contracted, or the evidences of such indebtedness having been issued in excess of the limit upon county indebtedness established by the constitution; 2. That the said judgments were procured through the consent and confession of the board of county commissioners contrary to law.

The questions certified for our decision are as follows:

1. Is the levy of the board of county commissioners of the county of Crook of three and one-fourth mills of judgment tax as set forth in plaintiff's petition, and the agreement of parties thereto attached, in excess of the limitation as fixed by the constitution and laws of the state of Wyoming?

³⁷⁷ 2. Separate and apart from each of the propositions herein made, is or is not the defendant entitled to judgment on its agreement with the plaintiff (exhibit "A," plaintiff's petition), for the sum of nine hundred and twenty-seven dollars and sixty-six cents?

3. For what purposes can a tax be levied by the board of the county commissioners in excess of the twelve mills limitation and under the term "public indebtedness and interest thereon," as the term is used in section 5 of article 15 of the constitution?

4. Can a tax in excess of twelve mills be levied by the board of the county commissioners for the payment of an indebtedness growing out of and by reason of the provisions of chapter 6 of the laws of 1893, entitled "An act to encourage the destruction of predatory wild animals"?

5. Can a tax in excess of twelve mills be levied by the board of the county commissioners for the purpose of paying warrants issued for salaries of county officers when the revenue of the county derived from taxation in previous years has not proved sufficient to defray its expenses, and such warrants are outstanding and unpaid for the want of sufficient funds?

6. Does the placing of warrants, issued for legitimate county expenses, into judgment, justify the board of the county commissioners in levying a tax in excess of twelve mills with which to pay the same?

7. In case judgment has been rendered in favor of a land-owner for damages caused by the location, construction, and opening of a public road through his land, can a tax be levied to pay such judgment in excess of twelve mills provided by law to be levied for all county purposes, the revenue raised by the twelve-mill tax being all required and used for county purposes?

8. Has the board of the county commissioners authority and power, under the constitution and laws of the state, to confess and authorize a confession of judgments against the county?

³⁷⁸ 9. Can a judgment, rendered by the district court of Crook county, having jurisdiction over the person and subject matter, be attacked collaterally in this case?

10. Cannot the board of the county commissioners levy the district court tax, for the maintenance of the court, in addition to the levy of twelve mills for county revenue?

The second question, viz., "Separate and apart from each of the propositions herein made, is or is not the defendant entitled to judgment on its agreement with the plaintiff (exhibit 'A,' plaintiff's petition) for the sum of nine hundred and twenty-seven dollars and sixty-six cents?" cannot receive our consideration, for the reason that the facts do not sufficiently appear in the pleadings before us to authorize a complete determination thereof upon the merits of the cause.

For the purpose of convenience, we propose to discuss the legal questions involved in the various questions, without, in general, a specific reference to any particular question, or the order in which they are presented. A majority of the certified

questions do not admit of categorical answers. A careful elucidation of the views entertained by the court covering the subject matters of the questions, ought to, and, we conceive, will be sufficiently indicative of our opinion upon the questions themselves.

Involved in the questions thus submitted is the construction of the various constitutional provisions affecting the power of counties to incur indebtedness and levy taxes. The gravity of the interests which may depend upon a determination of these questions has not been underestimated, and, with a keen appreciation of the responsibility resting upon the courts in such matters, it is only after studious and mature deliberation that we have arrived at our conclusions. Upon the argument much attention was devoted by counsel to the policy of the constitutional restrictions upon public indebtedness, and taxation; but the courts possess no control over matters of mere policy. If the people of the commonwealth, by adopting a constitution, have committed themselves to a mistaken policy, the only remedy is an ³⁷⁹ amendment, by constitutional methods, of that instrument. Within the province of the legislature, recourse must be had to that body for the correction of any errors of policy which may have induced its enactments. The jurisdiction of the courts extends only to the construction and enforcement of the constitution and laws as they exist. That jurisdiction should be zealously guarded, but not used as a cloak to encroach upon the functions of the other departments of government. The provisions of the constitution controlling the matters before us are as follows:

"For county revenue there shall be levied annually a tax not to exceed twelve mills on the dollar for all purposes including general school tax, exclusive of state revenue, except for the payment of its public debt and the interest thereon. An additional tax of two dollars for each person between the ages of twenty-one and fifty years, inclusive, shall be annually levied for county school purposes": Const., art. 15, sec. 5.

"No county in the state of Wyoming shall in any manner create any indebtedness exceeding two per centum on the assessed value of taxable property in such county, as shown by the last general assessment, preceding; provided, however, that any county, city, town, village, or other subdivision thereof in the state of Wyoming, may bond its public debt existing at the time of the adoption of this constitution, in any sum not exceeding four per centum on the assessed value of the taxable property in such county, city, town, village, or other subdivision as shown by the last general assessment for taxation": Const., art. 16, sec. 3.

"No debt in excess of the taxes for the current year shall, in any manner, be created by any county or subdivision thereof, or any city, town, or village, or any subdivision thereof, in the state of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people thereof and by them approved": Const., art. 16, sec. 4.

³⁸⁰ Other provisions which may affect the construction to be given to the sections above quoted will be referred to as we proceed.

We are to consider the power and authority of a county in this state: 1. To create indebtedness; and 2. To levy taxes.

Prior to the admission of Wyoming as a state, municipal and county indebtedness in this as well as other territories was limited by congressional enactment to four per centum on the value of the taxable property within such corporation or county, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness: Stats. 1st Sess. 49th Cong., c. 818, p. 171; Rev. Stats. Wyo., 1887, p. 39. The language of that act is as follows: "That no political or municipal corporation, county, or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness exceeding," et cetera. Acknowledging this past limitation upon county indebtedness, the constitution expressly authorized the bonding of the public debt of any county in any sum within the congressional limit of four per cent: Const., art. 16, sec. 3. As a primary proposition, it must be manifest that the framers of the constitution did not propose to afford vitality to any indebtedness incurred in excess of the limitation declared by Congress. In case any county had become so indebted, it was not permitted to issue bonds to pay such excess; and no other constitutional provision refers to it. This may become an important consideration. County indebtedness amounting to, but not exceeding, four per cent on the assessed value of taxable property was therefore recognized as valid and enforceable; and as no limitation was placed by the constitution upon the power to levy taxes to pay the valid public debt of a county, means were allowed by which the same could be eventually satisfied. It is also clear that, in authorizing the funding of county indebtedness ³⁸¹ in an amount not exceeding four per cent, all manner of indebtedness, whether for imposed or voluntary obligations, was understood to be included within the congressional limitation, it being obvious that the inten-

tion was to permit the bonding of all legal and valid debts existing at the time of the adoption of the constitution; and that it was not the purpose to repudiate any valid obligation or liability.

Upon future indebtedness another limit was placed by the constitution: 1. It is provided that no county shall in any manner create any indebtedness exceeding two per centum on the assessed value of taxable property in such county, as shown by the last general assessment, preceding; 2. No debt in excess of the taxes for the current year shall, in any manner, be created by any county, unless the proposition to create such debt shall have been submitted to a vote of the people and by them approved. Without reference, now, to the classes of indebtedness included within these restrictions, if any distinction in that respect exists, it is apparent that, if the indebtedness of a county has reached or exceeds two per cent on the assessed value of taxable property, such county is powerless to create any debt in excess of the taxes for the current year, either with or without a submission of the matter to a vote of the people or their approval thereof. The absolute limit of lawful indebtedness being reached, it cannot be exceeded. If, however, the indebtedness of a county thus restrained is less than such two per centum, then there arises the further prohibition against the creation of any debt in excess of the taxes for the current year without first submitting the same to a vote of the people and thereby securing their approval; but, in such case, if a proposition of that character is so submitted to and approved by the people of the county, then, so far as concerns the constitutional provisions, such county becomes authorized to create the additional debt, if, together with the existing indebtedness, it will not exceed two per centum on the assessed value of the taxable ³⁸² property within the county. Thus the two sections (sections 3 and 4 of article 16) are harmonious, and their meaning readily discerned. We apprehend no difficulty has arisen in reference to the obvious purport of the constitution in this regard. The intention evidently was: 1. To place an absolute limit upon the debt included in the provisions; and 2. To forbid any such debt to be created in any year even within the absolute limit, if in excess of the taxes of the current year, without the sanction of the people of the county; and when the final limit was reached to require the affairs of the county to be conducted practically upon a cash basis.

The more serious question, however, is, What debts are included within these constitutional prohibitions? It is insisted by

counsel for defendants that they do not embrace any debts imposed by law, or such as may be termed "compulsory obligations," such as salaries of officers, which are definitely established by the legislature. It is urged that the constitution requires the legislature to fix the amount of the salaries of county officers; and that when thus fixed the obligation is one which the county has not created; and it is contended that the restriction upon indebtedness applies only to such liabilities as had been incurred by the county authorities, voluntarily, and therefore that, in determining whether the debt of a county exceeds the limit established by the constitution, the amount of the salaries of its officers and warrants outstanding to pay them are not to be considered. That a county in its corporate capacity, acting through its commissioners, are not prohibited from creating any indebtedness which, exclusive of such imposed or compulsory obligations, do not in the one case exceed the taxes for the current year, in the other two per centum upon the assessed value of the taxable property in the county.

We have approached this question with some hesitation, as it is impossible not to be impressed with its great significance. The argument briefly adverted to is not without some force, and rests to some extent upon precedent: ³⁸³ Grant County v. Lake County, 17 Or. 453; Lewis v. Widber, 99 Cal. 412. In the case of Grant County v. Lake County, 17 Or. 453, the supreme court of Oregon, construing the provisions of the constitution of that state prohibiting a county from creating any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, held that such inhibition did not imply that all debts and liabilities of a county over the sum named were necessarily obnoxious to the constitutional provisions. And in the course of the opinion the learned judge said: "Said provision, as I view it, only applies to debts and liabilities which a county, in its corporate character, and as an artificial person, voluntarily creates."

In Lewis v. Widber, 99 Cal. 412, the supreme court of California held, under a constitutional provision prohibiting any county from incurring in any manner or for any purpose any indebtedness or liability exceeding in any year the income and revenue provided for it for such year without the assent of two-thirds of the qualified voters, that it referred only to an indebtedness or liability which the municipality has itself incurred; that it limited the power of the municipality as to any indebtedness which it has a discretion to incur, or not to incur; and

the opinion is expressed by the court in that case that such is the clear intent and meaning of the provision.

The effect of that decision is that if, in expending the revenues of any year, a municipality in paying salaries of officers and other expenses, the latter including such as have been incurred through the discretion of the local authorities, such revenues are exhausted, salaries and other imposed obligations thereafter are valid, but no other liability can then be incurred; and what more than one-half of the qualified voters are powerless to accomplish, the legislature, which might not be strongly representative of the particular municipality, may do; that the legislature is not amenable to the restrictive provisions of the constitution, and it may fasten numerous burdens in the way ³⁸⁴ of indebtedness upon the people, which the local authorities are without authority to incur unless two-thirds of the voters shall acquiesce therein.

On the other hand, the courts of other states, and the supreme court of the United States, have reached a different conclusion under somewhat similar constitutional provisions. The constitution of Missouri provides that no county shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof, nor with such assent to an amount in the aggregate exceeding five per cent on the value of the taxable property therein, et cetera.

In the case of *Barnard v. Knox County*, 105 Mo. 382, the county was sued upon a warrant issued for books and stationery bought for the use of the clerk of the county court, which the law required to be furnished. The defense was interposed that the debt was created after the county warrants exceeded the revenue of the year in question. Anticipating such defense, the plaintiff had pleaded that the debt was created by law, and was not the act of the county authorities. The supreme court of that state had previously held that there was a distinction between compulsory obligations and debts voluntarily contracted by the county: See *Potter v. Douglas Co.*, 87 Mo. 240. In the present case, the former was expressly overruled, and a contrary opinion expressed. The court say, after quoting the constitutional provision: "The language just quoted is clear and explicit, and construes itself. It is broad and comprehensive as to the character of the indebtedness. It includes indebtedness created in any manner, or for any purpose. This strong and

comprehensive language admits of no distinction between debts created by a county court, and debts created by law. In a sense, all county debts are created by law; for the counties possess those powers, and those only, which are conferred upon them by the constitution ³⁸⁵ and laws of the state. While it is the duty of the county court to care for paupers and insane persons, and to build bridges and repair roads, still the county court is governed by the statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law, as well as debts incurred by the county clerk for books and stationery."

Under a somewhat similar provision in the constitution of Colorado prohibiting a county from becoming indebted, the supreme court of the United States in *Lake Co. v. Rollins*, 130 U. S. 662, in reversing the case of *Rollins v. Lake Co.*, 34 Fed. Rep. 845, in speaking upon this question said: "Neither can we assent to the proposition of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials, affect the question." The action in which this opinion was delivered was brought upon warrants issued in payment of fees of witnesses, jurors, constables, and sheriff. A clause in the constitution of Illinois provides that "no county, city," et cetera, "shall be allowed to become indebted in any manner or for any purpose," et cetera. In that state it is held that in respect to such prohibition no distinction exists between debts imposed by law, and those voluntarily assumed, and that it makes no difference whether the debts are incurred for necessary current expenses or not: *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Prince v. Quincy*, 105 Ill. 215; *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385. A similar construction is given to the constitutional prohibition against county and municipal ³⁸⁶ indebtedness in Iowa: *Council Bluffs v. Stewart*, 51 Iowa, 385; *National State Bank v. Indiana School Dist.*, 39 Iowa, 490; *French v. Burlington*, 42 Iowa, 614. See, also, *Guthrie v. New Vienna Bank*, 4 Okla. 194, where this question is fully and learnedly discussed.

We are not unmindful of the difference in language between the constitution of this state and that of some of the other states above referred to, but, in respect to the present inquiry, we fail to observe that the courts have drawn or indicated any distinction by reason of such difference in language. The object in either case is the limitation upon municipal indebtedness. To "become indebted" would seem to be no broader, nor to be any more restrictive, than to "create a debt." If a county is prohibited from "becoming indebted," we are not able to impart to that language any greater restriction upon the character of the indebtedness than if the prohibition is against the "creation of a debt." If the constitutional limitation operates to restrain the legislature from imposing obligations upon a county in excess of the limitation in the one case, so far as the mere difference in words is concerned, it would have the like effect in the other case. In the California and Oregon cases it does not appear that there was also a constitutional limitation upon the means of raising the annual revenue as is the case with us, which might aid or control the construction to be given to the debt limitation. Recurring to our own constitution, we are required to give that effect to its provisions which will harmonize all the parts bearing upon the question. An inspection of the limitations placed upon indebtedness and taxation will demonstrate with satisfactory clearness the object, purpose, and intent which found expression in the provisions under consideration. We have already adverted to the limitation placed by Congress upon municipal and county indebtedness which controlled while we remained in a territorial condition; and the fact that all debts which could during that period have been lawfully incurred were given recognition, ³⁸⁷ and provision inserted in the constitution permitting the funding of the same. That no indebtedness theretofore incurred exceeding four per centum (the congressional limitation) was thus recognized, clearly displaying a constitutional interpretation of the former limitation, embracing by necessary inference in such limitation all debts for salaries of officers, and other imposed or so-called compulsory obligations. The constitution in the same section established a smaller limit upon future debts, reducing the limitation to two per centum; and, as if to emphasize the intention to compel the strictest economy in the conduct of county and municipal affairs, further required that no debt in excess of the taxes for any year should be created without the approval of the people. Like restrictions are placed upon the creation of debts

by the state. In making provision for taxation, the constitution again resorts to the method of limitation. For county revenue, for all purposes, except the payment of the public debts and interest thereon, the rate of taxation is limited to twelve mills. If it is to be assumed that the debt limitation does not include any imposed liabilities, then the tax of twelve mills was merely to provide revenue to satisfy voluntary obligations, if they should amount to enough to consume all the funds raised by such levy for county revenue, and as the imposed obligations would be unpaid, a fund each year might then be provided by a tax without limit to pay them as a part of the public debt. It must be manifest that salaries of public officers, the fees of witnesses and jurors, and such other expenses as may be said to be compulsory which relate to the ordinary management of county affairs are properly chargeable to and payable out of the general county revenue; and the conclusion is irresistible that in providing authority to tax for county revenue for all purposes, the section unequivocally comprehends the furnishing, by that particular tax, of funds out of which all obligations ordinarily and properly chargeable to and payable out of the general annual county revenue shall be discharged; **388** unless, indeed, at the time any such obligations are contracted, other provisions are made in pursuance of the constitution and laws having specific reference to their future payment, in another manner and out of other funds, as might be the case of the creation of a debt in excess of the taxes in any year by consent of the people, the county having authority to incur such a liability. In such case, it would not be intended to charge such debt to the ordinary county revenue. Salaries being unquestionably chargeable ordinarily to county revenue, and the tax for county revenue being a limited tax, it would seem to follow that the restriction upon incurring liabilities in excess of current taxes includes such salaries and other claims against a county similarly situated. Had this not been the intention, provision would have surely been made for an additional tax, clearly expressed to pay such an important class of liabilities as salaries of officers. We are of the opinion that no county board, money being in the general fund, raised by the tax for general county revenue, ever hesitated to allow and pay salaries out of that fund. The limitation upon taxation, then, being upon the power to raise a fund out of which salaries are payable, must not the restriction upon the right to create debts in excess of the taxes include in the term "debts," all ordinary expense of

the county inclusive of salaries? We think so. The evident object of all these provisions was an economical administration of public affairs, which is rendered more emphatic, if possible, by the maximum placed upon the salaries of the various county officials: Const., art. 14.

It is assumed that the board of county commissioners constitutes the county, and that a liability imposed by law is not the creation of a debt by the county, not being within the discretion of the board. It is doubtful whether the board does constitute the county in the strict sense. As an official board it is charged with many duties and invested with numerous powers respecting the management of the ordinary, and particularly the local, affairs of ³⁸⁰ the county; this authority, however, is not exclusive in all matters; it is, after all, not boundless. Some of the important interests of a county are not permitted to be delegated to the board; viz., the matter of compensation to be paid to its public officials; others are under the control of independent officers, such as the collection of taxes, although the board may exercise a qualified supervision over the conduct of the officers charged with such duties. The supreme court of Indiana, in discussing the relation of the board to the county, said: "We know that comprehensive powers are conferred upon county commissioners. We know, too, that they are, in a sense, the county. But, after all, the county is no more than a public corporation created by statute, and deriving its power from the legislature. If a county is not given power to fix the fees of public officers by statute, it can possess no such power. It adds nothing, therefore, to the strength of appellee's position to affirm that the board of county commissioners is the county. But it is not strictly true that the board is the county. It can by no possibility be true that the board is the county; for in a just sense the inhabitants of the organized locality constitute the county. In strict accuracy, the commissioners are public officers representing the county, with powers and duties defined and prescribed by statute. The money which they control is the money of the county, the debts which they incur are the debts of the county, and the authority they exercise is such as resides in them as the officers and representatives of the county": Board of Commrs. v. Barnes, 123 Ind. 403.

It may be equally as accurate to say that the legislature is the county within the sphere of its control, as to make that application to the commissioners. In all matters of public concern it would seem appropriate to attach to the legislature the

character of representatives of the county itself, whenever it assumes control of any of its interests, either in pursuance of constitutional requirement or otherwise, and that in doing so it acts for the counties in about ³⁹⁰ the same way that the local board does regarding those matters committed to the direction of the latter; and, thus, if an obligation is imposed upon the county, it cannot be said to be compulsory to any greater extent than if imposed by the county board. "Municipal corporations," and in this designation, so far as concerns this discussion, we include counties, "are of a twofold character, the one public, as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the necessities and conveniences for the citizens": *Davock v. Moore*, 105 Mich. 120. In fixing salaries of county officers the legislature deals with counties as one of the agencies of government. In respect to its officers and the duties they are required to perform, the county is public in character.

The supreme court of the United States in *Lake Co. v. Rollins*, 130 U. S. 662, indicated that, from an accurate standpoint, the compulsion arising on account of imposed obligations might not be to incur debt. It is evident that such compulsion in all cases does not result in a debt and, rather by way of suggestion than argument, it may be said that the character of debt in excess of taxes as applied to unpaid salaries does not necessarily arise from the enactment of the law providing their amount and times of payment, but that it is possible the allowance of other claims within the discretionary control of the board and the use of funds in the general fund, or raised by the county revenue tax to satisfy such claims, may so deplete the treasury, as to create the inability to pay the salaries or other so-called imposed liabilities. Therefore, it may not be entirely accurate to say that the debt is created by the legislature even if any distinction should be thought to exist respecting this matter within the terms of constitutional provision.

Before leaving this branch of the case, we call attention to some very pertinent remarks contained in the address to the people, prepared by a committee of the constitutional convention, submitted to that body prior to its ³⁹¹ adjournment, and embraced in the record as a part of its proceedings. We quote: "The extravagance in the management of county affairs that has prevailed in the past has been circumscribed and rendered impossible. The restrictions upon taxation and the creation of public debts are such as to necessitate economy in public affairs

and insure to the people the highest excellence in government for the least money."

This is strong language, and indicates that the purpose had been to place an additional restriction upon public indebtedness and taxation. Considering the limitations theretofore in force, the restraint upon taxation under existing territorial laws and the construction given to antecedent limitations, it is readily observed that if the construction given to the constitution by counsel for defendants is correct, the statements quoted from the address were but delusions, and that, instead of having further circumscribed county extravagance, the limitations were practically removed. We are aware that the address is not to be entirely controlling of the construction; but in connection with past conditions and events, in the light of which constitutional provisions must be interpreted, such an address may very properly be resorted to as indicating somewhat the intent and object which caused the incorporation of disputed clauses into the fundamental law.

Whether the constitutional limitations include all obligations of whatever character, we cannot in this case properly determine, and do not do so. It has been held by some eminent authorities that similar limitations do not cover a debt established against a municipality for a tort: *Bloomington v. Perdue*, 99 Ill. 329; *Chicago v. Sexton*, 115 Ill. 230; *Bartle v. Des Moines*, 38 Iowa, 414. It will be time enough, however, to decide that question when it is clearly presented in a proper case.

We are constrained to express as our opinion that the limitations upon county indebtedness include salaries of ³⁰² county officials, and as well such obligations as are legal and valid and lawfully imposed under the legislation of 1893, respecting the payment of bounties for the destruction of certain predatory wild animals, as the same reasoning in the main applies with equal force to those liabilities. In this connection we expressly refrain from deciding or indicating any opinion whatever regarding the constitutionality of that legislation, or the validity of any claims arising thereunder, irrespective of questions touching the debt and tax limitations.

We are convinced that any different construction would be destructive of the plain import and object of the constitution, and would invite the most reckless and improvident administration of public affairs: and notwithstanding that the burdens of taxation are now conceived to be oppressive, temperate language would utterly fail to depict the condition which might

result if the contention of counsel on behalf of the counties is sound. We do not desire to be understood as impugning in the least the motives, or the honesty, or patriotism of those at this time or heretofore in charge of county governments; we appreciate the many difficulties of their position, and are aware that in no public office is a higher degree of care, sagacity, and withal of integrity required and often displayed than that through which the affairs of these local agencies of the state are administered. If inconveniences or consequences are to receive consideration, the hardships which may accompany an attempt to confine county indebtedness and taxation within constitutional boundaries cannot approach in all that would be disastrous the effects that might follow if the construction otherwise insisted on was to prevail. Nevertheless, the courts are powerless to alter the constitution, and should not attempt to evade its clear and imperative commands. As has been already suggested, the remedy, if any is deemed to be necessary, resides elsewhere.

We come now to a consideration of the judgments. Assuming that the claims upon which the judgments were ³⁹³ rendered were in excess of the limit, it is contended that they cannot be attacked collaterally by the plaintiff taxpayer in this case; that they are conclusive as to the validity of the debt, and, therefore, constitute a part of the public debt of the county, for which a tax may be levied irrespective of the limit as to taxation for county revenue. The question, so far as this case is concerned, resolves itself into this: Do judgments, assuming them to have been rendered by a court of competent and general jurisdiction, having likewise jurisdiction of the parties, form a part of that public debt of the county for which a levy may be made to provide funds for their payment, although, in fact, the warrants upon which they are founded were issued for current expenses in excess of the taxes for the current year, and in excess of the absolute constitutional limit upon county indebtedness? Is any inquiry into the indebtedness back of and behind the judgments precluded by them? It is apparent that several questions are involved in such an inquiry. Not only are we to determine the meaning and scope of the words "public debt" as used in the section of the constitution providing for county taxation, but the effect of the judgments as to their conclusiveness or otherwise, and in respect to what matters they are conclusive, if any, become matter for investigation. Upon this branch of the case we are aided materially by the authorities.

After judgment upon a claim preferred against a county or municipality, it has been frequently, and where that question alone was involved, uniformly, held in mandamus proceedings to compel the levy of a tax to pay the judgment, that an allegation that the debt upon which the judgment was rendered had been created in excess of the constitutional limit upon such indebtedness and was illegal and void, constitutes no defense; that such defense by the county is absolutely precluded by the judgment, as it could have been interposed in the suit wherein the judgment was obtained: *Howard v. Huron*, 5 S. Dak. 539; *State v. Gloyd*, 14 Wash. 5; ³⁹⁴ *United States v. Board of Auditors*, 28 Fed. Rep. 407; *United States v. New Orleans*, 98 U. S. 395; *People v. Board of Commrs.*, 7 Colo. App. 200; *Aetna Life Ins. Co. v. Lyon County*, 44 Fed. Rep. 329. And the citizen and taxpayer cannot attack such a judgment any more than the county: *Clark v. Wolf*, 29 Iowa, 197; *Freeman on Judgments*, sec. 178; 2 *Black on Judgments*, sec. 584; *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619.

In the case of *Clark v. Wolf*, 29 Iowa, 197, the court said: "It must be, in the absence of fraud or collusion or the like on the part of the municipal officers, that the legal liability of the county being once fixed by a valid judgment, the citizen, no more than the county, can afterward resist the collection of said judgment upon the want of power to contract the debt. That stage of the controversy is past." And in the same case those matters which may be contested by the taxpayer, even in case of a valid judgment, is also stated as follows: "If the officers shall attempt to make a levy not warranted by law (for instance, a greater per cent than the law allows), or to collect the same in an illegal manner, or the like, these are questions between the citizen and the corporation, and do not touch either the validity of the debt or the correctness of the judgment which is intended to be satisfied." The distinction thus mentioned we regard as clearly existing. The validity of the debt was, or could have been, fully litigated in the suit in which the judgment was secured. That question is, therefore, absolutely concluded as against a collateral attack both as concerns the county, and a citizen or taxpayer thereof; but it does not necessarily follow that the county may levy, or the judgment creditor may insist that it shall levy, a tax to pay the same not authorized by law. The cases holding that a power to contract a debt includes authority to pay it, and, where a tax is essential for such purpose, the authority and duty to tax, do not contravene this view; none

of those cases, as I understand them, announce a contrary doctrine.

³⁹⁵ Having determined this much, the inquiry arises, How far may a county go in its annual tax levy? For county revenue for all purposes, the annual levy must be confined within twelve mills, and this is inclusive of school tax. For the payment of its public debt and the interest thereon, there is no limit. The legislature of the state, in amending the territorial statutes requiring the annual levy, conformed them to the constitution, authorizing an annual levy of not to exceed three mills for general school purposes, and prescribing that an annual tax should be levied for county revenue for all purposes; but providing that the aggregate tax for county revenue, including general school tax, should not exceed twelve mills on the dollar (exclusive of state revenue), excepting from such limitation the payment of the public debt and interest thereon: Laws 1895, c. 102, p. 237. Prior to the enactment just alluded to, the laws in force anterior to statehood remained unaffected by any later legislation, but were, of course, modified by the constitutional clauses referred to. Those earlier statutes prescribed certain rates of taxation for various purposes connected with county revenue, and placed a maximum limitation of sixteen mills upon county taxation, which was held by this court to be exclusive of the general school tax. When the constitution took effect, it immediately reduced the maximum limit to twelve mills, and included therein the general school tax.

It is now urged that the judgments in question constitute a part of the public debt of the county, to pay which the county may levy a tax irrespective of the taxation for county revenue; and our attention is directed to section 1798 of the Revised Statutes of 1887. That section is found in the chapter devoted to the powers and duties of county commissioners, and was enacted prior to the admission of the state, and continued in force unless in conflict with the constitution. It provides, in substance, that when a judgment shall be rendered against the board of county commissioners of any county, or against any ³⁹⁶ county officer, in an action prosecuted by or against him or them in his or their name of office, where the same shall be payable by the county, no execution shall issue thereon, but the same shall be paid by a tax levied and collected for that purpose as in the case of other county charges, and when so collected shall be paid by the county treasurer to the person to whom the same shall be adjudged upon the delivery of a proper voucher there-

for. The argument is, that as the judgments must be paid by a tax, and they are part of the public debt, as to which no limitation applies, the tax complained of is legal, without regard to the nature of the claims merged in the judgments. On the other hand, it is earnestly insisted that the judgments do not form a part of the public debt, to pay which unlimited taxation is permitted. Counsel for plaintiff contend, first, that bonded indebtedness alone is what is intended by the term "public debt" in the section of the constitution referring to county taxation, and it seems also to have been urged that no indebtedness which did not exist at the time of the adoption of the constitution is included. We cannot entirely agree with the position taken by either counsel. It is obvious that debts incurred since the adoption of the constitution, if lawfully existing, are not excluded. To exclude them would have the probable effect of preventing subsequently organized counties from paying their legitimate public debt, although the same could not have existed at the time the constitution was adopted. There are other reasons, however, which suggest the unsoundness of that contention. We are further of the opinion that the public debt which is excepted from the general tax limitation is not confined to bonded indebtedness. The same words, "public debt," are used in section 3 of article 16, permitting the bonding of the public debt of the county existing at the time the constitution was adopted; and it is clear that in the latter section the words were not exclusive of indebtedness other than bonded; but that they comprehended all manner of lawful ³⁹⁷ debts, not exceeding the congressional limitation of four per cent; and such has been the legislative and public construction placed upon that section. We are unable to attribute any narrower meaning to those words as used in section 5 of article 15, relating to taxation. It is not confined to bonds, but may involve ordinary warrants, and other evidences of indebtedness if properly and lawfully issued, and may also include judgments, but not necessarily so. To illustrate: If a county's indebtedness is within the constitutional limitation, and, in pursuance of law, it creates a debt in excess of the current taxes by the consent and approval of the people, which together with existing indebtedness, does not exceed the amount within which it may lawfully become indebted, such debt will not only be legal, but, although it may be evidenced alone by warrants, will constitute a part of the public debt, and to pay the same a tax is permissible the same as in the case of bonded indebtedness. If judgments are rendered upon

such warrants or upon bonds, the debts themselves being lawful public debts of the county, the judgments will partake of the same character. On the contrary, in case warrants or other evidences of indebtedness are issued for ordinary current expenses, in excess of the taxes for the current year, without the consent or approval of the people, or in case the maximum limit has been reached, then with or without such approval, such indebtedness is clearly not a part of the public debt, but the same have been incurred for current expenses, which in the case of such a county cannot in any event exceed the revenue for such year. There is no method by which such liabilities can have imparted to them voluntarily the character of public debts. If a judgment is obtained upon any such claim, the fact must yet remain that it represents a liability incurred for current expenses which should have been confined within the limit of the current taxes, to provide for the payment of which the constitution has afforded only a limited power of taxation.

398 The statutory provision with reference to the payment of a judgment by tax does not contemplate a tax in excess of the limitation, and did not permit a tax for that purpose in excess of the statutory limit anterior to the adoption of the constitution. Much less could the legislature contravene the positive restrictions of the constitution. If the judgments are rendered upon claims which should have been paid out of the revenue raised by the tax which is confined to twelve mills, they must be paid, if at all, by a tax levied for such purpose, the aggregate tax for county revenue not to exceed the maximum limit. The judgments being valid, the legality of the debt is settled until such judgments are set aside in some direct proceeding, and therefore within the limitation for county revenue a tax may be levied to pay the same. This we apprehend to be the plain intent of the constitution. Any other course would amount to an evasion of its terms. A different construction would authorize such a management of county affairs as to exhaust the county revenue each year, to incur additional obligations ordinarily payable out of such revenue, permit prosecution of such claims to judgment, and the levy of a special tax to pay them; and this could be repeated annually, thus completely evading, if not operating to effectually nullify, the constitutional limitation. The effect would be, as all must concede, to provide a greater revenue each year for current expenses than the constitution intended to authorize when it con-

fining the same to twelve mills on the dollar. This would accomplish by indirection that which cannot be done directly, which, generally at least, is not allowable. The views thus expressed we believe to be in accord with the authorities.

As it is apparent that under the law requiring a judgment to be paid by tax, the latter must, if levied, be confined with other taxes within existing constitutional limitations, it necessarily follows that to determine the limitation the claims placed in judgments must be inquired into.

The statute authorizes a tax to pay such judgments "as ³⁰⁰ in the case of other county charges." The funds to pay other county charges for ordinary expenses are raised by a limited tax. As the statute with respect to a judgment does not fix its class, and does not authorize a special tax irrespective of statutory or constitutional limitation, it is obvious that we must have recourse to the claims themselves to determine to what class the judgment belongs, and whether any limit is imposed upon taxation, by which they may be enforced. The application of the converse of this proposition has not been infrequent. In the case of *Ralls County Court v. United States*, 105 U. S. 735, the court said: "While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." This language was used in a cause wherein it was sought by mandamus to compel the levy of a tax to pay a judgment. The opinion in that case also recognizes that courts are powerless to require a tax to be levied even to pay a judgment in excess of the constitutional or legislative limitation upon the taxing power.

The same learned court in another case of like character, in speaking upon this question, said: "So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. . . . We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize": *United States v. Macon County*, 99 U. S. 591.

"But mandamus will not lie to compel the levy of a tax in excess of legal limitation": *Cooley on Taxation*, 2d ed., 738.

The following authorities are also in point: *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493; *Arnold v. Hawkins*, 95 Mo. 569; *Black v. McGonigle*, 103 Mo. ⁴⁰⁰ 192; *Trull v. Board of*

Commrs., 72 N. C. 388; French v. Board of Commrs., 74 N. C. 692; Supervisors v. United States, 18 Wall. 71; In re House Roll, 31 Neb. 505; Clark v. Davenport, 14 Iowa, 494; Iowa R. R. Land Co. v. County of Sac, 39 Iowa, 137; Sterling School etc. Co. v. Harvey, 45 Iowa, 466; Shackelton v. Guttenberg, 39 N. J. L. 660; Union Pac. R. R. Co. v. Board of Commrs., 9 Neb. 449; Board of Commrs. v. Blake, 25 Kan. 356; State v. County of Marion, 21 Kan. 419; Board of Commrs. v. King, 67 Fed. Rep. 202; Desty on Taxation, sec. 41.

The case of Board of Commrs. v. Blake, 25 Kan. 356, closely approaches the one at bar. The question there presented was whether a county board, after having levied the full amount of taxes for current expenses which it had by law any power to levy for that and previous years, could in a certain year levy an additional tax to pay a judgment rendered upon county warrants which had been previously issued to pay county current expenses for the same years. An express statutory provision required a judgment to be collected by tax as in case of other county charges, and the general limitations upon taxation were statutory instead of constitutional. The right to levy such a tax was denied, the Kansas supreme court saying: "The judgment shall be collected by means of a tax, in the same manner as other county charges are collected; and other county charges, when collected by means of a tax can be collected only by means of a limited tax. . . . A judgment rendered upon a claim against a county is simply one of the items which the county board takes into consideration in levying a tax for county charges, or for county expenses, or for current expenses. . . . All the statutes upon the subject seem to contemplate that the county board will not create, nor allow to be created, liabilities against the county faster than the legal and proper taxes will pay them. But suppose the county board should allow liabilities ⁴⁰¹ to be thus created; then may all the creditors of the county convert their claims into judgments, and then compel the county board to levy county taxes vastly beyond the limits prescribed by section 181? We think not."

The supreme court of the United States in *Brownsville v. Loague*, 129 U. S. 493, held that, it appearing from the petition that the bonds upon which the judgments were rendered were issued under an abrogated statute, and were consequently void, and that no power to tax to pay them was possessed by the taxing district, because such power was given only by the statute

which had ceased to exist, mandamus to levy tax to pay the judgments would not be awarded.

The constitution excepts from the limit for taxation for county revenue purposes, not the payment of judgments, but the payment of the public debt. We are unable to class a judgment in all cases, irrespective of the nature of the obligation merged therein, as a public debt within the purview of the section of the constitution in question. The constitution clearly and forcibly distinguishes between those liabilities which are payable out of the general and ordinary revenue, and those for which provision must otherwise be made. It was not intended that a county powerless to legally contract debt which could not be paid out of the current revenue, because of its exhaustion in paying other expenses, could nevertheless, by incurring such debts, be permitted to employ unlimited taxation to defray those expenses which the constitution declares must be provided for by a limited tax.

Our attention has been called to the case of *Thiess v. Hunton*, before the supreme court of Idaho. Although the text of the decision in that case is not before us, extracts therefrom found in No. 14 of volume 1 of *Selected Corporation Cases* indicate that it was held that municipal indebtedness incurred during a given fiscal year cannot be paid out of the income or revenue of any future year unless it be especially raised for the payment of such indebtedness, on the ground that the evident intent of the ⁴⁰² constitution of that state was to make the revenue or income collected each year pay such year's indebtedness unless, by the assent of two-thirds of the qualified voters given as provided by law, other indebtedness was authorized.

It follows from what has been said that to raise a fund to pay salaries of county officers, and valid liabilities under the act with reference to bounties for the destruction of predatory wild animals, a tax in excess of twelve mills in any year for county revenue is not allowable, unless the debt therefor has been created in the manner provided in the constitution and any legislation conformable thereto, by a county possessing authority to incur such indebtedness.

The tenth certified question inquires if the board of county commissioners cannot levy the district court tax for the maintenance of the court, in addition to the levy of twelve mills for county revenue.

What we have already said disposes of this inquiry. We fail to observe anything in the constitution or statutes which au-

thorizes a levy for court expenses in excess and exclusive of the limited tax of twelve mills for county revenue.

With respect to the seventh question: We assume the damages to have been recovered in a proceeding to determine the compensation to be paid the landowner by reason of the exercise by the public of the right of eminent domain and the consequent taking of some of the land for public purposes. We regard this as not entirely free from doubt, but are inclined to the opinion that the damages thus assessed are payable out of the ordinary county revenue; and the result would be that, if the county is unable to make the compensation, it is powerless to complete the location of the road, which might result in the taking of private property without just compensation. If the damages are recovered as for a tort, another inquiry would arise which in this case we refrain from deciding.

The final question requiring the opinion of this court ⁴⁰³ affects the right of the board of county commissioners to confess and authorize a confession of judgments against the county.

A decision upon that question is not free from difficulty. We are practically without precedent, and resort must be had to our rather meager statutory provisions covering the subject of confession of judgments, as well as to those prescribing the duties and powers of the board of county commissioners.

"A person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction and with the assent of the creditor or person having such cause of action, confess judgment, whereupon judgment shall be entered accordingly": Rev. Stats. 1887, sec. 2668. In such case, it is required that the debt or cause of action be stated in the judgment or writing to be filed as pleadings in other actions: Rev. Stats. 1887, sec. 2669.

"An attorney who confesses judgment in any case shall, at the time of making such confession, produce the warrant of attorney for making the same, . . . and the original or a copy of the warrant shall be filed with the clerk": Rev. Stats. 1887, sec. 2671. In the first case, under section 2668, the debtor must personally appear.

The members of the board of county commissioners, individually, are not authorized to allow claims against the county. The board of commissioners, at any meeting, is given authority by statute to settle and allow all accounts against the county, and, when so settled and allowed, they may issue county orders therefor as provided by law: Rev. Stats. 1887, sec. 1901. County

orders are required to be signed by the chairman of the board and attested by the clerk, under the seal of the county: Rev. Stats. 1887, sec. 1807, as amended, Laws 1893, c. 33. The meetings of the board are to be held in public: Rev. Stats. 1887, sec. 1802. The authority over county affairs is thus vested in a board which is composed of three persons, although a majority constitute a quorum and may act. The board can only ⁴⁰⁴ act at a meeting of the board. Doubtless some detail matters may be attended to by one or more of the commissioners outside of a meeting by previous authority of the board, or such act may, in some cases, perhaps, be ratified; but the allowance of claims must be at some time the act of the board as such. The county is constituted by law a body politic and corporate, and its powers as such corporate body are exercised by a board of county commissioners. Such powers are to be exercised and the duties devolving upon the board are to be discharged in the manner provided by law. We do not understand that the members composing the board are authorized to act as a board except when together in session. Their act is then not individual, but as a body, acting as a unit: *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758. Whatever authority, if any, is possessed by the commissioners to confess a judgment against the body corporate and politic—the county—must reside in them as constituting a board, rather than as individual officers. As such a board, required to act as a body, we are unable to conceive that it can personally appear in court, as required by section 2668. No statutory provision exists empowering one or more of the commissioners or any other official to so personally appear and in the name of the county enter confession of judgment. In the absence of some such provision, in the present condition of the law concerning judgments by confession, we are clearly of the opinion that the board of commissioners are without authority to personally appear in court and confess a judgment against the county. It would seem to follow, that, being powerless in that respect, the board, even as a body, cannot authorize some person to do so. Such authorization could only be accomplished, however, by the execution of a warrant of attorney. No express power to execute such an instrument is granted by statute, nor do we observe any authority given the board from which such power can be implied.

In discussing this matter, it is, perhaps, needless to state ⁴⁰⁵ that we refer only to confession of judgments in its strict sense; and do not refer to actions regularly brought, in which

issues are duly framed, and upon hearing or trial, by admission of the lawful representative of the county in such suits, the court may be satisfied of the justness of the claim sued upon, and thereupon enter up judgment. Such an action is not dependent upon the statutes governing confession of judgments, but is, in reality, a judgment rendered upon trial and proof. We tender this explanation that any possible confusion respecting the decision of the court may be avoided. This, I believe, disposes of all the questions.

Groesbeck, C. J., and Conaway, J., concur.

MUNICIPAL CORPORATIONS—LIMITATIONS UPON INDEBTEDNESS—CONSTITUTIONAL LAW.—The better opinion is, that the word "indebtedness," used in constitutions in reference to debts contracted by cities and counties, is not used in any special or limited sense. So far as any general definition may be given, it may be said that every indebtedness arising upon contract, whether express or implied, and by virtue of which a city is under obligation to pay money to a person, whether natural or artificial, is within these prohibitions, unless funds are on hand or, at least, provided for the payment of such indebtedness out of the current revenues of the municipality: Monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 230. The moment indebtedness is voluntarily created in any manner, or for any purpose, with no money or means in the treasury, nor current revenues collected, or in process of collection, for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limitation of indebtedness: *Earles v. Wells*, 94 Wis. 285, 59 Am. St. Rep. 886. A debt cannot be incurred beyond the constitutional limit, even for current expenses, no matter how urgent: *Laporte v. Gamewell etc. Tel. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359. The same is true of the salary of a public officer, if such salary is based upon a contract between the officer and the municipality. But if the salary is fixed by law, and made payable out of municipal funds, it is regarded as a compulsory indebtedness, and compulsory indebtedness is usually held to be not within the constitutional prohibition: Monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 236; *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52. See, also, *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 69 Am. St. Rep. 321. The obtaining of a judgment against a municipality is not the creation of a debt against it, within the meaning of a constitutional provision fixing a limit to the indebtedness which the municipality may incur: *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224.

A JUDGMENT AGAINST A MUNICIPAL CORPORATION is conclusive evidence of a pre-existing debt at the time of its rendition, and, if such debt was in excess of such constitutional limit, that was matter of defense to be interposed in the suit in which the judgment was rendered; and, if not so interposed, it is waived and cannot be made the basis of a collateral attack on the judgment: *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224.

BARRETT v. MAHNKEN.

[6 WYOMING, 541.]

NEGOTIABLE INSTRUMENTS—CONSIDERATION.—Notes executed by third parties to a woman, in consideration of her written release of another from all claims for damages for a breach of promise to marry her made by such other, are based upon a sufficient consideration, although the latter was not a party to the notes and did not authorize their execution.

NEGOTIABLE INSTRUMENTS—CONSIDERATION.—A valid consideration for a note may consist of an injury to the payee, as well as of a benefit to the maker or to a third person.

NEGOTIABLE INSTRUMENTS—CONSIDERATION—DURESS.—Notes, the consideration for which is the release by the payee of a third person from all claim for damages for breach of promise to marry, are valid, and though made under threats to kill such third person, at that time in another state, they are not executed under duress.

DURESS—WHAT CONSTITUTES.—Duress by threats exists only when such threats excite a fear of some grievous wrong, as of death, or great irremediable injury, or unlawful imprisonment, about to be then and there, or at least very shortly, inflicted.

DURESS BY THREATS—WHAT CONSTITUTES.—To constitute duress by threats they must be such as would naturally excite such a fear, grounded upon reasonable belief, that the person who threatens has present means of carrying his threats into execution, as would overcome the will of a person of ordinary courage. The mere fact that a person has entered into a contract under the influence of a threat does not necessarily constitute duress.

M. Nichols, for the plaintiff in error.

J. L. Stotts and N. K. Griggs, for the defendant in error.

543 CONAWAY, C. J. It is admitted that the notes sued on were executed by all of the defendants in error, but it is claimed that the notes were executed without consideration, and the trial court so finds.

The evidence as to the circumstances which led to the execution of the notes develops a case sui generis. John Mahnken is not a party to either of the notes or to this **544** suit. He is a son of one of the parties, H. C. Mahnken; a brother of another, W. L. Mahnken. It does not appear positively whether G. W. Rosenbaum is a relative or not. *There is testimony indicating, inferentially, that he is an uncle. D. C. Horning is not a relative—merely a neighbor. John Mahnken was engaged to be married to plaintiff in error on December 5, 1893. Prior to that date, it does not appear just how long prior, he requested a postponement of the ceremony on account of the illness of his mother. This request was refused. On Decem-

ber 3d, he departed for Missouri. On January 24, 1894, the notes in suit were executed and delivered, and at the same time plaintiff in error executed the following "release": "The consideration of the note of five hundred dollars, and one of four hundred dollars, and one hundred dollars in cash in hand, the value of which is received, we hereby release all claims from John Mahnken for any damages which she might have received for reason of breach of promise to marry her." John Mahnken returned from Missouri, as nearly as he can remember, about the 1st of March, 1894. He testified that defendants in error had no authority from him to make any settlement with plaintiff in error, and that he did not learn of the execution of the notes until after his return. The trial court rendered judgment for defendants, making the following findings: "That the notes given in evidence and sued upon by the plaintiff at the time the same were given to the plaintiff did not constitute a settlement of the difficulties and disputes existing between the plaintiff and one John Mahnken."

The court further finds that "said defendants had no authority to make a settlement of the difficulties and disputes existing between the plaintiff and one John Mahnken, nor to give said notes in settlement thereof, and that no settlement in fact of said difficulties has been made, and therefore the court finds that the notes sued upon are without consideration and void."

The finding that defendants had no authority from ⁶⁴⁵ John Mahnken is sustained by the evidence. But defendants did not assume to act for John Mahnken. The plaintiff in error made no attempt in her petition to charge him. She had actually released all claims against him by her written instrument, which specified the consideration for such release as the two notes now in suit, and one hundred dollars paid in cash. The trial court finds that this was not a "settlement of the difficulties and disputes existing between the plaintiff and one John Mahnken." It would seem to be immaterial whether it was a settlement of disputes and difficulties or not. It was a release, upon consideration of one thousand dollars, of all claim for damages for the breach of promise to marry plaintiff in error on the fifth day of December. It is urged that John Mahnken was not bound by this contract. He had nothing to release, and no reason is apparent why he should be bound by this instrument. The purpose and effect of this instrument was to release, not to bind him. Plaintiff in error is bound, beyond question, by her writ-

ten release of all claims for damages, executed upon receipt of a valuable consideration therefor.

It is also urged that the makers of the notes received no consideration therefor. It is not necessary that any benefit should be received by them as a consideration. A valid consideration for a note may consist of an injury to the payee as well as of a benefit to the maker. Or the consideration may be a benefit to a third person.

Several of the defendants testify that they would not have executed the notes if plaintiff had not threatened to kill John Mahnken. They say, in substance, that they executed the notes to settle the matter and keep her from killing John Mahnken. Some of the witnesses say they were afraid that she or some of her relatives would do the murder. There is no evidence of any threat by anyone but herself. At the time of the threat John Mahnken was in Missouri, and she and defendants were in Wyoming.

The law recognizes such a thing as duress per minas. The law upon this subject is well epitomized as follows: ⁵⁴⁶ "Duress by threats exists, not wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death, or great irremediable injury, or unlawful imprisonment, about to be then and there, or at least very shortly, inflicted. The threat must be such as would naturally excite such a fear (grounded upon the reasonable belief that the person who threatens has at hand the means of carrying his threat into present execution) as would overcome the will of a person of ordinary courage": 6 Am. & Eng. Ency. of Law, 64.

No authority has been cited going to the extent that a woman can coerce four men in Wyoming by threatening the life of a fifth man, who is at the time in a distant state. Judgment reversed, and case remanded for new trial.

Reversed.

Potter and Corn, JJ., concur.

CONTRACTS—CONSIDERATION—SUFFICIENCY OF.—A consideration moving from one person will uphold a promise to a third person: *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184.

CONTRACTS—CONSIDERATION.—ANY DAMAGE, or any suspension of a right, or any liability to a loss occasioned to one by the promise of another, is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the promisor: *Mascolo v. Montesanto*, 61 Conn. 50, 29 Am. St. Rep.

170; *Bank of New Hanover v. Bridges*, 98 N. C. 67, 2 Am. St. Rep. 317.

DURESS—WHAT CONSTITUTES.—To constitute duress, there must be a seizure of property, or arrest of the person, or a threat or attempt to do one or the other, or facts must be stated which tend to show or warrant the conclusion that such arrest or seizure could be avoided only by payment of the demand: *Clafin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54. See extended note to *Hatter v. Greenlee*, 26 Am. Dec. 374.

DURESS BY THREATS.—To avoid a contract on the ground of duress per minas, the threats must be such as to strike with fear a person of common firmness and constancy of mind: *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *Cribbs v. Sowle*, 87 Mich. 340, 24 Am. St. Rep. 166.

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See Assignment, 4; Partnership, 1.

ACTIONS.

ACTIONS—DISMISSAL AFTER VERDICT.—Plaintiff in a civil action has no right to dismiss the case after the jury have arrived at a verdict against him and are about to return it into court, and after plaintiff and his counsel have been made aware of the result of the trial. (*Brunswick Grocery Co. v. Brunswick etc. R. R. Co.*, 249.)

See Assignment, 6, 7; Attachment, 2; Banks and Banking, 8; Building and Loan Associations, 6; Contracts, 3-7; Dogs; Judgment, 10; Nuisance, 1, 2, 5; Partnership, 2; Pleading, 5; Pledge, 2; Receivers, 4-6, 9; Services, 3, 8.

ADMIRALTY.

ADMIRALTY—CONCLUSIVENESS OF DECREE—OWNERSHIP.—When a vessel has been seized in admiralty, the court has jurisdiction to pass upon the question of its ownership, after affording parties an opportunity to appear and be heard, and its decree is conclusive upon them. Every person interested in the vessel is warned to come in and assert his interest, but no one can be decreed to be a part owner who has not appeared and asserted part ownership, or other interest therein. (*Moynihan v. Drobaz*, 46.)

ADVERSE POSSESSION.

See Landlord and Tenant, 2.

AGENCY.

AGENCY—POWER OF AGENT TO APPOINT SUBAGENT.

A conductor on a passenger train of a railway company is its agent, and it is bound by all his acts within the scope of his employment; but he has no authority, without express power conferred by the company, to appoint a subagent. (*Central etc. Ry. Co. v. Price*, 246.)

See Assignment, 4; Banks and Banking, 2; Contracts, 18; Damages, 7, 12; Husband and Wife, 1.

ANIMALS.

See Dogs.

APPEAL.

1. APPEAL—CONSIDERATION OF FINDING OUTSIDE OF ISSUE.—A finding which is against the admission of the pleadings, and outside of any issue presented in the case, must be disregarded. (*Moynihan v. Drobaz*, 46.)

2. APPEAL—CONFLICT OF EVIDENCE AS TO FACTS—ASSUMPTION OF FACT AS FOUND BELOW.—In a case where there is a substantial conflict of evidence as to a fact, the appellate court will assume it to be as found by the jury, in its verdict. (*Brittan v. Oakland Bank of Savings*, 58.)

3. APPEAL—REFUSAL OF LEAVE TO AMEND—ABUSE OF DISCRETION.—The matter of granting or refusing leave to amend a pleading is very largely in the discretion of the trial court, and its action in refusing such an application is not reviewable on appeal where no abuse of discretion is shown. (*Brittan v. Oakland Bank of Savings*, 58.)

4. APPELLATE PRACTICE—REVERSIBLE ERROR.—Reversal of a judgment must be directed on appeal, unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the complaining party. (*Smuggler Union Min. Co. v. Broderick*, 106.)

5. APPELLATE PRACTICE.—ORIGINAL EVIDENCE cannot be treated or considered by the supreme court on appeal. (*Zang v. Wyant*, 145.)

6. APPELLATE PRACTICE — CONSTITUTIONALITY OF STATUTE.—The question as to whether a statute was constitutionally passed cannot be considered for the first time on appeal. (*Zang v. Wyant*, 145.)

7. APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE.—If evidence, erroneously admitted over objection, is immediately withdrawn, and the jury is afterward instructed not to consider it, there is no available error. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

8. APPEAL — SPECIAL FINDINGS — SUFFICIENCY OF.—A special finding by a jury that, under the "rules" of a defendant railroad company, it was the duty of the engineer to do certain things, is supported by evidence of such duty, though no particular rule was introduced in evidence. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

9. APPEAL — SPECIAL FINDING — CONFLICTING EVIDENCE.—A special finding must stand where there was any evidence to support it, though there was strong conflicting evidence. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

10. APPEAL—INSUFFICIENT ASSIGNMENT OF ERROR—SPECIAL VERDICT.—A mere objection "to the filing of the defendant's request for a special verdict" is an insufficient assignment of error on appeal, for it does not properly present any question for the determination of the court. (*Udell v. Citizens' St. R. R. Co.*, 336.)

11. APPELLATE PRACTICE—REVIEWING ADMISSION OF EVIDENCE.—The admission of evidence subject to exception cannot be reviewed on appeal unless an exception is taken to the overruling of a subsequent motion to exclude such evidence. (*Flach v. Gottschalk Co.*, 418.)

12. APPELLATE PRACTICE—REVERSAL OF JUDGMENT.—A judgment cannot be reversed on appeal if, upon the whole case, it is right, though an erroneous reason may be given for entering it. (*Avery v. Popper*, 849.)

13. APPELLATE PRACTICE—CERTIFIED QUESTIONS.—If a statute authorizes an inferior court to refer an issue in law to the supreme court for determination, and makes it the duty of the lower court, "to certify the very question to be decided," "the very question" referred to does not mean an abstract question, which may determine the issue as presented in the lower court, but it means the issue itself as there presented and the precise question ruled upon as shown by the record. (*Galveston etc. Ry. Co. v. Zantzinger*, 859.)

14. APPELLATE PRACTICE—AUTHENTICATION OF BILL OF EXCEPTIONS.—The certificate of the clerk of court is necessary to properly authenticate a bill of exceptions brought into the record, either as an original or as a transcript thereof. (*Moyer v. Preston*, 914.)

15. APPELLATE PRACTICE.—The court of civil appeals of Texas has power to review and set aside the findings of the trial court or jury upon the facts; and such action by that court is binding upon the supreme court, but such findings cannot be made the basis for the rendition of a judgment by the court of appeals. (*Burgess v. Western Union Tel. Co.*, 833.)

16. APPEAL.—QUESTION NOT PASSED UPON BELOW WILL NOT BE CONSIDERED on appeal. (*Williamson v. Eastern Building etc. Assn.*, 822.)

See Instructions, 5, 6; Marriage and Divorce, 9.

ARBITRATION.

See Insurance, 15-17.

ARREST.

1. ARREST OF MISDEMEANANT—PREVENTION OF ESCAPE—LIABILITY FOR SHOOTING.—The shooting of a misdemeanor by an officer in order to arrest him, or to prevent his escape after arrest, is wrongful and unauthorized. (*Brown v. Weaver*, 512.)

2. ARREST OF MISDEMEANANT—LIABILITY OF OFFICER'S SURETIES FOR SHOOTING.—A misdemeanor, who has been shot by an officer, or his deputy, in attempting to arrest him under a warrant, or in attempting to prevent his escape after arrest, may maintain an action for damages on the officer's official bond. (*Brown v. Weaver*, 512.)

See Homicide, 9.

ARSON.

1. ARSON — INDICTMENT — SUFFICIENCY.—An indictment for arson, charging the burning of an "outhouse," need not allege whether such outhouse was located in a city, town, or village. (*Carter v. State*, 262.)

2. ARSON—"HOUSE"—WHAT IS.—The body of a freight-car, taken off the wheels and supported upon permanent posts attached to the ground and used as a freight warehouse, is a "house" within the meaning of a statute defining arson. (*Carter v. State*, 262.)

3. ARSON — OUTHOUSE — WHAT IS.—The word "outhouse," as used in a statute defining arson, and as applied to a structure not located within a city, town, or village, is intended to embrace a house of any description which is not a dwelling-house. Hence, it embraces a "freight warehouse." (*Carter v. State*, 262.)

ASSAULT.

See Instructions, 1.

ASSIGNMENT.

1. ASSIGNMENT OF ACCOUNTS—NOTICE AS A PROTECTION TO THE ASSIGNEE.—If book accounts, bills receivable, and other debts, are assigned, the assignee must give notice of his assignment to the debtors who owe such demands, if he would protect himself against them as well as a subsequent assignee of such demands, for value, without notice of the rights of the prior assignee. (*Graham Paper Co. v. Pembroke*, 26.)

2. ASSIGNMENT OF SAME ACCOUNTS TO DIFFERENT PERSONS—PRIORITY DEPENDS UPON NOTICE.—As between successive assignments of book accounts, bills receivable, and other debts, made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee, if taken without notice of the prior assignment. (*Graham Paper Co. v. Pembroke*, 26.)

3. ASSIGNMENT OF SAME ACCOUNTS TO DIFFERENT PERSONS—PRIORITY—ILLUSTRATION.—The rights of a creditor, who in seeking to obtain some security for his claim, takes an assignment from his debtor of the latter's book accounts, bills receivable, and other debts, but leaves the demands under the control of the assignor, as his agent, for collection, without notice to the debtors of the assignment, are subordinate to the rights of a subsequent assignee and bona fide purchaser of the same demands, who takes them without notice of the prior assignment, and who immediately gives notice of his assignment to the debtors, and obtains possession of the books and accounts. (*Graham Paper Co. v. Pembroke*, 26.)

4. ASSIGNMENT OF ACCOUNTS—ASSIGNOR AS AGENT FOR COLLECTION—ACCOUNTING.—A creditor who has taken an assignment from his debtor of the latter's book accounts, bills receivable, and other debts, and who leaves the demands under the control of the assignor, as his agent, for collection, is not entitled to an accounting, as against his assignor, in the absence of evidence that the latter has made collections. (*Graham Paper Co. v. Pembroke*, 26.)

5. ASSIGNMENT OF SHARES OF BANK STOCK—WHEN GOOD.—It is a good assignment of shares of bank stock to deliver the certificate thereof, with a blank transfer on the back of it, to which the holder has affixed his name. The party to whom it is delivered is authorized to fill up the blank indorsement. (*Brittan v. Oakland Bank of Savings*, 58.)

6. ASSIGNMENT OF PART OF CLAIM—SEPARATE SUITS. A claim may be assigned in parts to different persons, each of whom acquires a right to so much of the common fund, and is entitled to maintain an action thereon against the debtor. In bringing suit, the assignees should unite or be made parties, and not bring separate suits; but, if separate suits are brought, and then consolidated, the debtor can complain only as to the costs prior to the consolidation. (*Avery v. Popper*, 849.)

7. ASSIGNMENT OF PARTS OF CLAIM—SEPARATE ACTIONS—SEQUESTRATION.—If separate actions are brought by the respective assignees of a debt or claim and afterward consolidated, this is merely an irregularity, and does not render void writs of sequestration issued in such actions prior to the consolidation. (*Avery v. Popper*, 849.)

See Assignment for the Benefit of Creditors; Banks and Banking, 8; Insurance, 1; Judgment, 6; Mortgages, 5, 6; Pledge, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.**1. ASSIGNMENT—VOIDABLE—CHANGE OF POSSESSION.**

An assignment of personal property, not followed by a change of possession, is voidable by attaching creditors, unless the assignee can give satisfactory excuse for the want of delivery. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

2. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—CHANGE OF POSSESSION.—An assignment by an insolvent debtor for the benefit of his creditors generally is not within the reason of the rule that an assignment of personal property, not followed by a change of possession, is voidable by attaching creditors. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary conveyance of goods made by the owner at his domicile, in a form which is sufficient there and also at common law, is effectual to transfer the title, although they may, at the time, be in another state, unless the statutes or local policy of that state forbid. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT WHERE PROPERTY IN ANOTHER STATE.—The effect of a transfer made by the owner at his domicile, on goods in another state, is not to be determined simply by the rule of comity which is applicable to extraterritorial assignments by operation of law, but rests on the general principles of jurisprudence as to the right of everyone to dispose of what he owns. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—STATUS OF ASSIGNEE—FIDUCIARY RELATION.—An assignee for the benefit of creditors takes no higher or better right to the assigned assets than his assignor possessed, and, if the assignor stands in a fiduciary relation to the assets, that relation is cast upon the assignee. (*Midland Nat. Bank v. Brightwell*, 608.)

See *Banks and Banking*, 7.

ASSOCIATIONS.

1. ASSOCIATIONS—VOLUNTARY—MEMBERSHIP.—That a person accepted the proposal of a voluntary association to become a member and to manage its polo team, it being understood that he should participate in the profits and losses equally with the other members is sufficient to prove him a member of the association. (*Bennett v. Lathrop*, 222.)

2. ASSOCIATIONS—LIABILITY OF MEMBERS.—The members of a voluntary association are individually liable for an indebtedness incurred in the business for which it was organized, during the time of their membership, although they did not agree to become, nor did they hold themselves out as, partners, or as personally responsible, and, although the creditors gave credit to the associate name. (*Bennett v. Lathrop*, 222.)

3. ASSOCIATIONS—RIGHT OF REPRESENTATION.—If a statute provides that the number of members necessary to secure one representative in the supreme governing body of a fraternal benefit association shall be the unit of representation, and the number of times the membership in the state is greater than such unit is the number of representatives to which the state is entitled in the supreme body, and the constitution of such an association provides that there shall be one representative for the first five hun-

dred members, that constitutes the unit of representation, and, if there are four thousand members in the state, the association is entitled to eight representatives in the supreme body, although, under other provisions of its constitution, it would be entitled to but two representatives for such membership, if the constitution and not the statute were to control. (Supreme Lodge O. G. C. v. Simering, 409.)

4. ASSOCIATIONS—RIGHT TO VOTE—INJUNCTION.—If persons are regularly elected representatives in the governing body of a benefit association, and are then excluded from the right to vote by the existing officers, they are entitled to an injunction to restrain such exclusion. (Supreme Lodge O. G. C. v. Simering, 409.)

5. ASSOCIATIONS—JURISDICTION OF EQUITY TO REMOVE OFFICERS.—Equity has no jurisdiction to remove officers of a benefit association, although illegally elected, nor to restrain them by injunction from exercising the powers of their offices. (Supreme Lodge O. G. C. v. Simering, 409.)

6. ASSOCIATIONS—JURISDICTION OF EQUITY TO REMOVE OFFICERS.—Equity has no jurisdiction to determine the validity of an election of officers in a benefit association and to pronounce judgment of amotion. The title of the officers who are in office under color of an election, and who are, at most, irregularly chosen, cannot be inquired into in a suit in equity instituted to restrain them from exercising the functions of their offices, upon the ground of the irregularity of their election. (Supreme Lodge O. G. C. v. Simering, 409.)

7. ASSOCIATIONS—CONCUBINE AS BENEFICIARY—EXCLUSION OF CHILDREN.—A person named as beneficiary in a certificate of membership in a benevolent benefit society is entitled to the amount due at the death of the member, to the exclusion of his children, although the beneficiary named was the concubine or mistress of the member during his life, when, by the declarations of the articles of incorporation, by-laws, and constitution of the society, the sum due the beneficiary shall be disposed of as the member shall direct. (Independent Order etc. of Jacob v. Allen, 532.)

ATTACHMENT.

1. GARNISHMENT—JURISDICTION.—If summons of garnishment is based upon an action in which the court never acquires jurisdiction to render judgment against the principal defendant, payment by the garnishee of the amount of a debt owing by him to such defendant does not relieve the garnishee from liability therefor. (Southern Ry. Co. v. Newton, 279.)

2. GARNISHMENT—SITUS OF DEBT—ACTION IN REM.—An action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign insurance company doing business in both states, after the loss of a building owned by defendant and insured by such company, the company being served by service on the insurance commissioner, and the principal defendant being served by publication, is an action in rem, the res being the indebtedness due from the insurance company to the defendant, which has no situs in the state where the action is brought, and cannot be seized in such action. (Swedish-American Nat. Bank v. Bleecker, 492.)

3. GARNISHMENT.—THE SITUS OF A DEBT IS, as between different states or sovereignties, at the domicile of the creditor, al-

though the debt may, for the purpose of attachment or garnishment, be given by statute a situs also at the domicile of the debtor. (Swedish-American Nat. Bank v. Bleecker, 492.)

4. GARNISHMENT—SITUS OF DEBT.—A stipulation filed by a foreign insurance company doing business within the state in accordance with a statute, agreeing that any legal process affecting the company served on the insurance commissioner shall have the same effect as if served personally on the company, does not give such company a domicile within the state for all purposes, or bring therein the situs of a debt which it owes in another state, so as to authorize the garnishment of such debt in an action in rem within the state. (Swedish-American Nat. Bank v. Bleecker, 492.)

5. ATTACHMENT—GARNISHMENT OF JUDGMENT IN ANOTHER STATE.—After a debt has been reduced to final judgment, it is not subject to garnishment in another state. (Tourville v. Wabash R. R. Co., 650.)

6. ATTACHMENT — GARNISHMENT — JUDGMENT OF ANOTHER STATE—"FAITH AND CREDIT."—If state laws authorizing a garnishment proceeding are not complied with, a judgment therein may be pronounced void in another state without depriving it of that "faith and credit" to which, under the constitution of the United States, it is entitled in the courts of the latter state. (Tourville v. Wabash R. R. Co., 650.)

7. ATTACHMENT, WRONGFUL—MEASURE OF DAMAGES. In an action by a merchant to recover damages for a wrongful attachment, he is entitled to recover for the depreciation in value of the property seized, and the loss he has sustained by reason of the locking up of his store and the interruption of his business. (Kyd v. Cook, 661.)

8. ATTACHMENT, WRONGFUL—LOSS OF PROFITS AS ELEMENT OF DAMAGE.—Loss of profits reasonably, naturally, and ordinarily expected to follow the closing up of a merchant's place of business may be recovered in an action for wrongful attachment of all his goods. (Kyd v. Cook, 661.)

9. ATTACHMENT, WRONGFUL—PLEADING AND PROOF—LOSS OF CREDIT.—A complaint in wrongful attachment specifically alleging that plaintiff's credit was injured and destroyed because of the fact that the sheriff attached and removed his property and locked up and closed his place of business is sufficient, against a demurrer, on the ground of the omission to give the names of persons who refused plaintiff credit because of the attachment, and such averment is broad enough to admit evidence of all damages sustained by plaintiff in consequence of the wrongful attachment, including his loss of character, credit, and business. (Kyd v. Cook, 661.)

10. ATTACHMENT, WRONGFUL.—THE MEASURE OF DAMAGES for wrongful attachment of property is all the loss and damage the owner has sustained thereby, including gains prevented by the attachment. (Kyd v. Cook, 661.)

11. ATTACHMENT, WRONGFUL—LOSS OF PROFITS—EVIDENCE.—In a suit by a merchant against a sheriff for damages for wrongful attachment of his goods during a certain period, evidence of the sales and profits made by such merchant in his business, during a corresponding period of the previous year, under substantially the same conditions, is competent, as affording a reasonably certain basis for determining the profits lost by the merchant in consequence of the interruption of his business. (Kyd v. Cook, 661.)

12. ATTACHMENT—MOTION TO DISSOLVE—DECISION AS TO CAUSE OF ACTION.—It is not error for a judge, upon a motion to dissolve an attachment, made at chambers upon affidavits, to determine whether the plaintiff has a cause of action, when it is necessary to do so. (*Williamson v. Eastern Building etc. Assn.*, 822.)

13. ATTACHMENT.—A DEBT is separate and distinct from the evidence of it. Hence, a debt, though secured by a note and mortgage, may be attached, even where the sheriff cannot reduce the securities to possession. (*Williamson v. Eastern Building etc. Assn.*, 822.)

14. ATTACHMENT—MOTION TO DISSOLVE—CONSIDERATION OF MERITS.—On appeal from an order dissolving an attachment, questions involving the merits of the case will not be considered. (*Williamson v. Eastern Building etc. Assn.*, 822.)

15. ATTACHMENT OF PROPERTY OF FOREIGN CORPORATIONS—CONSTRUCTION OF STATUTES.—The provisions of the South Carolina code, subjecting the property of foreign corporations to attachment, have not been repealed by the laws of that state, which impose conditions upon which foreign corporations are allowed to do business therein. (*Williamson v. Eastern Building etc. Assn.*, 822.)

See Execution, 9; Receivers, 1-3; Replevin, 1, 7; Shipping, 1.

ATTORNEY AND CLIENT.

ATTORNEY AND CLIENT—PURCHASE OF JUDGMENT BY ATTORNEY.—An attorney who purchases judgments against his client at a discount cannot reap an advantage therefrom. Such purchase operates for the benefit of the client, and the attorney is entitled only to the amount he paid for the judgments. (*Olson v. Lamb*, 670.)

See Judicial Sales, 5-9; Mortgages, 3.

BAGGAGE.

See Railroads, 16.

BANKS AND BANKING.

1. BANKS—COLLECTIONS—DUTY AS TO—PAYMENT.—As a collecting agent. It is the duty of a bank which receives a note or draft for collection to present it for payment, and, unless otherwise specially authorized, to receive in payment nothing but money, or that which, by common consent, is considered and treated as money. (*Midland Nat. Bank v. Brightwell*, 608.)

2. BANKS — COLLECTIONS — PRINCIPAL AND AGENT—DEBTOR AND CREDITOR.—When a note or draft is sent by one individual or bank to another for collection, and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of debtor and creditor. (*Midland Nat. Bank v. Brightwell*, 608.)

3. BANKS — COLLECTIONS — PROVISIONAL CREDIT ON BOOKS—CANCELLATION THEREOF.—A bank which receives a note or draft for collection does not owe the amount thereof to the sender until collected, and, though it may enter a credit therefor in its books, the bank may treat such credit as provisional, and cancel it if the paper is afterward dishonored. (*Midland Nat. Bank v. Brightwell*, 608.)

4. BANKS — INSOLVENCY — COLLECTIONS ARE NOT A TRUST FUND, WHEN—PREFERENCE DENIED.—If one bank sends drafts to another bank for collection, which is made by charging the accounts of depositors against whom the drafts are drawn, with their consent, and remitting its own draft, which is not paid, the sending bank, upon the insolvency of the collecting bank, is not entitled to be preferred over other creditors, for the assets of the collecting bank have not been augmented or increased by the collection items, though its liability to depositors has been decreased to the amount of the drafts by the method of collection adopted. (*Midland Nat. Bank v. Brightwell*, 608.)

5. BANKS—INSOLVENCY—INCREASE OF ASSETS—WHAT IS NOT.—When courts speak of assets being increased by the reception of a trust fund, they mean actual assets. The mere canceling of a liability to one debtor and the transferring of it to another, on the same books of an insolvent bank, is not an actual increase of assets. (*Midland Nat. Bank v. Brightwell*, 608.)

6. BANKS—INSOLVENCY—RIGHTS OF GENERAL CREDITORS—TRUST FUND.—The creditors of an insolvent banking corporation are entitled to subject its estate to their demands, but justice and equity give them no right to appropriate the estate of another, which it holds in trust. (*Midland Nat. Bank v. Brightwell*, 608.)

7. BANKS—INSOLVENCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUST FUND AS A PREFERRED CLAIM.—The general assets of an insolvent bank having been enlarged and increased by the unlawful conversion of a trust fund, the bailor or cestui que trust is entitled pro tanto to have the amount of the converted fund declared and enforced as a preferred demand against the assigned estate of the bank over the claims of general creditors. (*Midland Nat. Bank v. Brightwell*, 608.)

8. BANKS—MISMANAGEMENT—ACTIONS AGAINST DIRECTORS FOR LOSSES—STOCKHOLDERS—CREDITORS.—AN ASSIGNEE of an insolvent bank can maintain an action against its directors for losses sustained by the bank because of their failure to exercise ordinary care and diligence in the management of its business, as he, by reason of the assignment, succeeds to all interests and assets of the bank; so, if he refuses to sue, the stockholders, who are the real parties in interest, may maintain an action in their own names, making the corporation a defendant; but, mere creditors of the bank cannot maintain such an action. (*Union Nat. Bank v. Hill*, 615.)

9. BANKS—REMEDIES AGAINST DIRECTORS FOR LOSSES THROUGH NEGLECT.—The board of directors of a bank are answerable for losses to it, sustained by reason of loans made in violation of the statute, as well as to insolvent persons, in an action at law by the corporation while it is a going concern, or by the assignee after an assignment, or, in an action in equity, by the stockholders, in the event of the assignee's declination to bring suit. (*Union Nat. Bank v. Hill*, 615.)

10. BANKS—GROSS NEGLIGENCE OF DIRECTORS—WHAT IS.—The board of directors of a bank are guilty of gross negligence, where they leave the entire management of its business to the cashier. (*Union Nat. Bank v. Hill*, 615.)

11. BANKS — DIRECTORS — LIABILITY OF, FOR LOSSES THROUGH NEGLECT.—The board of directors of a bank are answerable for losses sustained by it, through the acts of its cashier.

in lending moneys not only in excess of the limit prescribed by statute, but to insolvent persons, where they, by the exercise of ordinary care, might have known, and were, therefore, in duty bound to know that this was being done; and it is no excuse for such neglect that they received no benefit from such loans and that their services were gratuitous. (Union Nat. Bank v. Hill, 615.)

12. BANKS—MISMANAGEMENT — LOSSES—LIABILITY OF DIRECTORS AT SUIT OF CREDITORS.—The mere failure of bank directors to exercise ordinary diligence and care as such, in the management of the business affairs of the bank, by reason of which it becomes insolvent, does not make them answerable at the suit of persons who are merely general creditors of the bank. (Union Nat. Bank v. Hill, 615.)

13. BANKS—BOARD OF DIRECTORS—INALIENABLE DUTY. Under the statute of Missouri, the management of the affairs and business of a bank devolves upon the board of directors or managers. The functions thus imposed upon them are inalienable, and cannot be conferred upon any officer; and this applies with peculiar force to the making of loans and discounts. (Union Nat. Bank v. Hill, 615.)

14. BANKS.—THE ORDINARY CARE REQUIRED OF THE DIRECTORS of a bank in the performance of their duties is such care and diligence as a prudent man exercises in the conduct of his own affairs, in view of all the surrounding circumstances. (Union Nat. Bank v. Hill, 615.)

15. BANKS—DUTIES OF DIRECTORS AS TO SUBORDINATE OFFICERS.—The board of directors of a bank must use ordinary care and diligence to know the conduct of their subordinate officers, as well as what the bank-books show, and to carefully observe the law under which the bank is organized. (Union Nat. Bank v. Hill, 615.)

16. BANKS—DUTIES OF DIRECTORS AS TO BUSINESS—PRESUMPTION.—The board of directors of a bank are bound to know all that is done by it, as well as the system and rules arranged for its doing; and what they ought to know as to the general course of the bank's business they will be presumed to have known, in a contest between the bank and third persons dealing in good faith with it. (Union Nat. Bank v. Hill, 615.)

See Pledge, 1, 2, 4, 5.

BENEFICIARY.

See Associations, 7.

BILL OF EXCEPTIONS.

See Appeal, 14.

BONDS.

See Replevin, 2-10.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—MATURITY OF SHARES.—Shares in a building and loan association mature only when the periodical payments thereon, taken in connection with the other income of the association, bring their value up to par. (Bertche v. Equitable Loan etc. Assn., 571.)

2. BUILDING AND LOAN ASSOCIATIONS—TRANSACTIONS WITH MEMBERS—NATURE OF.—The transaction between a

building and loan association and a borrowing member is not a loan in the direct sense of the word, but only a prepayment or advancement to the shareholder of that to which he will ultimately be entitled, a sale by the borrower to the association of his prospective interest. (*Bertche v. Equitable Loan etc. Assn.*, 571.)

3. BUILDING AND LOAN ASSOCIATION—RIGHTS OF MEMBERS.—It is part of the fundamental law governing building and loan associations that all members must participate equally in the profits and bear the losses equally, and any contract by an association in contravention of this mutuality of interest and responsibility is ultra vires and void. (*Bertche v. Equitable Loan etc. Assn.*, 571.)

4. BUILDING AND LOAN ASSOCIATIONS—SHAREHOLDERS' NOTICE OF CHARTER AND BY-LAWS.—Borrowing members, as well as other members of a building and loan association, are deemed to have notice and are bound by its charter and by-laws unless the latter are illegal, and, where the by-laws of such an association provide that stockholders shall pay dues, interest, et cetera, until such time as their shares shall mature and their stock be worth its full par value, such provision is binding upon a borrowing stockholder, regardless of the terms of the special contract of loan entered into with the association by him, the terms of which would permit the maturity of his shares of stock before they had attained par value. (*Bertche v. Equitable Loan etc. Assn.*, 571.)

5. BUILDING AND LOAN ASSOCIATIONS—ULTRA VIRES CONTRACTS—MATURITY OF SHARES.—If the statutes governing a building and loan association fix no definite or arbitrary period at which the shares shall reach their par or maturity value, the association has no power to do so, and an attempt in notes and trust deeds to fix such period of maturity arbitrarily at one hundred months is ultra vires and of no effect. (*Bertche v. Equitable Loan etc. Assn.*, 571.)

6. BUILDING AND LOAN ASSOCIATIONS—AGREEMENT ULTRA VIRES—TORT—RETENTION OF BENEFITS—CAUSE OF ACTION.—If an agreement fixing a definite time for the maturity of the shares of a building and loan association is ultra vires, and the association enters into it knowing that it cannot perform its part thereof, and thereby induces one to part with his money in the purchase of stock, it is a tort for which the association is answerable. So, if it derives and retains benefits from the purchaser, under such an agreement, he would have a cause of action therefor. (*Williamson v. Eastern Building etc. Assn.*, 822.)

7. BUILDING AND LOAN ASSOCIATIONS—REPUGNANCY BETWEEN AGREEMENT AND BY-LAWS—CONSTRUCTION OF CONTRACT.—If the certificates of stock and circulars of a building and loan association express a definite time at which its stock will mature, but the charter and by-laws at the expiration of such time show that the shares have not matured, thus creating a repugnancy, and irreconcilable conflict as to the time when the shares will mature, the certificates of stock and circulars must prevail, in a suit brought by a stockholder, who purchased with reference to them, to compel the association to pay for his shares. (*Williamson v. Eastern Building etc. Assn.*, 822.)

8. BUILDING AND LOAN ASSOCIATIONS—MATURITY OF SHARES—CONFLICT AS TO TIME—ELECTION—PUBLIC POLICY.—In an action against a building and loan association, by one of its stockholders to compel it to pay for the plaintiff's shares, public policy, in order to prevent the perpetration of fraud, demands

that the defendant should not be allowed to elect whether it will be bound by its by-laws, or its express agreement, as to the time when its shares will mature. (*Williamson v. Eastern Building etc. Assn.*, 822.)

See Contracts, 15.

BURDEN OF PROOF.

1. **BURDEN OF PROOF — MEANING — DEFINITION.**—The term "burden of proof" may have two meanings. It may be used to indicate the burden which rests on every party to a cause of going forward, if he be met by a traverse, and establishing the total proposition or series of propositions which constitute his disputed case. It may also be used to denote a duty cast by law upon one party to meet and rebut the effect of some piece of evidence introduced by the other. (*Baxter v. Camp*, 169.)

2. **BURDEN OF PROOF—EXECUTION OF AND SIGNATURE TO INSTRUMENT.**—In a suit upon an instrument, which upon its face shows that the signature had been crossed out, or that it had been written over a line of crosses, or that it had been rewritten over a previous signature which had been erased, the burden of establishing the execution of the instrument and its delivery to him, bearing the defendant's signature, is on the plaintiff. (*Baxter v. Camp*, 169.)

3. **BURDEN OF PROOF.**—A party is always and continuously bound to prove his side of the case, if he is met by a traverse. (*Baxter v. Camp*, 169.)

See Fraudulent Conveyances, 3; Negligence, 9; New Trial, 1; Railroads, 7; Trusts, 4; Warehousemen, 1.

CARRIERS.

1. **CARRIERS — NEGLIGENT DELAY — LOSS BY FIRE—PROXIMATE AND REMOTE CAUSE.**—If a carrier negligently delays the transportation of goods, and they are destroyed by an accidental fire not originating on the carrier's premises and for which he is not responsible, he is not liable, as the fire is the proximate cause of loss, while the delay is only the remote cause. (*Yazoo etc. R. R. Co. v. Millsaps*, 543.)

2. **CARRIERS—NEGLIGENT DELAY—LOSS FROM UNFORESEEN CAUSE.**—Although a carrier, by negligent delay in transportation, exposes goods to loss or injury by act of God, or other cause for which he is not responsible and could not naturally foresee, he is not liable. (*Yazoo etc. R. R. Co. v. Millsaps*, 543.)

3. **CARRIERS—PASSENGERS—TRANSFERS—NEGLIGENCE.** If a passenger is given a transfer ticket from one electric-car to another to enable him to reach his destination, and, while in the highway approaching and near to the proper car for him to take under the terms of the transfer, he is struck by a piece of the trolley pole, which breaks while it is being turned from one end of the car to the other, and while the company or its servant is not exercising extraordinary care toward the holder of the transfer, he is entitled, as a passenger, to recover for the injury thus sustained. (*Keator v. Scranton Traction Co.*, 758.)

See Negligence, 10.

CAVEAT EMPTOR.

See Judicial Sales, 1, 2; Trusts, 3, 4.

CEMETERIES.

1. CEMETERIES—REGULATION OF—NUISANCES PER SE. While cemeteries are within the power of reasonable regulation by cities, counties, and towns, they are not to be regarded as nuisances per se, in measuring the extent of the police power to regulate them. (Los Angeles County v. Hollywood etc. Assn., 75.)

2. CEMETERIES—ORDINANCE REGULATING — UNEQUAL OPERATION—INVALIDITY.—A county ordinance which makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the county without the permission of the supervisors, but which impliedly permits burials in cemeteries already established, without restriction, is invalid and not enforceable by the county. It is unreasonable, because it makes the right to follow a lawful occupation dependent upon the arbitrary will of the supervisors; and it is unequal in its operation, because it discriminates in favor of a class of persons within the same district; that is, it allows the owners of cemeteries already established the right to exercise privileges denied to those who have no permission; and whether the permission may or may not be granted rests in the arbitrary power of the supervisors. (Los Angeles County v. Hollywood etc. Assn., 75.)

3. CEMETERIES — REGULATION OF, BY CITIES OR TOWNS, AND COUNTIES—REASONABLENESS—DISTINCTION. An ordinance passed pursuant to the constitutional grant of power to make police regulations concerning cemeteries may be reasonable, when confined to the limits of a city or town, but entirely unreasonable when put in operation in all parts of a large county, thinly populated in many of its parts. (Los Angeles County v. Hollywood etc. Assn., 75.)

4. CEMETERIES—ESTABLISHMENT AND MAINTENANCE OF, AS A LAWFUL OCCUPATION—INJURIOUS TENDENCY.—It is not unlawful to establish and conduct a cemetery for the burial of the dead, deriving profit therefrom, as a business enterprise. It cannot even be presumed that the business of conducting a cemetery is an occupation which has an injurious tendency. (Los Angeles County v. Hollywood etc. Assn., 75.)

See Police Power, 2.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES—REGISTRATION AS NOTICE.—A recorded chattel mortgage, with power in the mortgagee to sell on default, is notice of the rights of the mortgagee to a purchaser from the mortgagor. (Avery v. Popper, 849.)

2. CHATTEL MORTGAGES — DESCRIPTION—SELECTION BY MORTGAGEE.—A chattel mortgage on a specified number of cows and their calves, out of a designated herd containing a larger number, with power to the mortgagee to sell on default, gives him the right to select such cows and calves from the herd, provided the selection is made while the calves are following the cows, but if the selection is not made until the calves have ceased to follow their dams, all right of selection as to the calves is lost. (Avery v. Popper, 849.)

CHECKS.

See Forgery, 1; Negotiable Instruments, 4

CIVIL DEATH.

See Execution, 4.

CODES.

CODES—CONSTRUCTION OF SECTIONS.—If a section of the code of a state has been codified from a decision of its supreme court, such section must be construed in the light of the source from which it was taken, unless the language imperatively demands a different construction. (*Calhoun v. Little*, 254.)

COLLATERAL ATTACK.

See Judgment, 8.

COMMERCIAL AGENCIES.

See Sales.

COMMUNITY PROPERTY.

See Husband and Wife, 4.

CONFLICT OF LAWS.

See Assignment for the Benefit of Creditors, 3, 4; Contracts, 17; Insurance, 8; Telegraph Companies, 8.

CONSIDERATION.

See Fraudulent Conveyances, 2; Negotiable Instruments, 7-9; Suretyship, 11.

CONSTITUTIONS.

1. **CONSTITUTIONAL LAW.—RAILROAD CORPORATIONS ARE "PERSONS,"** within the meaning of constitutional provisions, both state and federal, concerning equality of rights or equality of laws. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

2. **CONSTITUTIONAL LAW—LIMITATIONS UPON COUNTY INDEBTEDNESS.**—Under the Wyoming constitution, if the indebtedness of a county is less than two per cent of the assessed value of the taxable property therein, it cannot create any debt in excess of the taxes of the current year, without first submitting the question to a vote of the people, and thereby securing their approval, and with such approval the county is authorized to create the additional debt, if, together with existing indebtedness, it does not exceed such two per cent; but, the absolute limit of lawful indebtedness being reached, it cannot be exceeded in any event. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

3. **CONSTITUTIONAL LAW—LIMITATION UPON COUNTY INDEBTEDNESS.**—Under the Wyoming constitution, if the indebtedness of a county has reached or exceeds two per cent on the assessed value of taxable property, such county is powerless to create any debt in excess of it for the current year, either with or without a submission of the matter to a vote of the people or their approval thereof. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

See Municipal Corporations, 13-15; Statutes, 17.

CONTEMPT.

See Depositions, 2.

CONTRACTS.

1. **CONTRACT IN RESTRAINT OF TRADE—WHEN VOID—BUSINESS OF BILL POSTING—GOODWILL.**—An agreement by a vendor of stock in a corporation engaged in the business of bill

posting, and other methods of advertising, to abstain from carrying on a similar business, in the same city, so long as the vendee, or his successor in interest, shall carry on a like business therein, is declared by the statute of California to be void, as in restraint of trade, and is, therefore, not enforceable. The element of goodwill is not present in such a transaction. (*Merchants' Ad-Sign Co. v. Sterling*, 94.)

2. **CONTRACT IN RESTRAINT OF TRADE—WHEN VOID—BUSINESS OF BILL POSTING.**—Under a statute providing that every contract by which any person is restrained from exercising a lawful business of any kind is to that extent void, a contract not to engage in the business of bill posting, which is a lawful business, is an agreement in restraint of trade, and is therefore void. (*Merchants' Ad-Sign Co. v. Sterling*, 94.)

3. **CONTRACT FOR BENEFIT OF THIRD PARTY.**—A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance. (*Baxter v. Camp*, 169.)

4. **CONTRACTS—ACTION UPON.**—The general rule is, that an action at law for the breach of a contract can only be brought by a party thereto. (*Baxter v. Camp*, 169.)

5. **CONTRACT FOR BENEFIT OF THIRD PARTY.**—A third person may maintain an action upon a contract made for his direct, sole, and exclusive benefit, where it was part of the agreement that its object should be communicated to him. (*Baxter v. Camp*, 169.)

6. **CONTRACT FOR BENEFIT OF THIRD PARTY—PROMISE OF HUSBAND TO WIFE TO PAY MONEY TO SON.**—A promise made by a husband to his wife to pay her son a certain sum of money upon her death, if the son were then living, cannot be regarded as a promise made for the direct, sole, and exclusive benefit of the son, and the son can maintain no action for the breach thereof. (*Baxter v. Camp*, 169.)

7. **CONTRACT—WHO MAY SUE—EXECUTORS AND ADMINISTRATORS.**—The personal representative of the deceased wife is the only party who can sue at law for the failure to perform a contract made by a husband with such wife to pay her son a certain sum of money upon her death, if the son were then living. (*Baxter v. Camp*, 169.)

8. **CONTRACTS IN WRITING—EVIDENCE TO VARY.**—Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. (*Burns etc. Lumber Co. v. Doyle*, 235.)

9. **RELEASE—CONTRACT OF—WHAT IS—INVALIDITY.**—Under a statute which prohibits all contracts releasing corporations from liability for personal injuries to their employes, a contract between a railroad company and an employe, whereby the latter agrees that the acceptance of certain benefits shall operate as a release of all claims for damages against the company, is a conditional release of the company from liability, and is void under such statute. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

10. **CONTRACTS OF A LUNATIC** who has not been found by an inquisition to be insane are not absolutely void, but merely voidable. (*Flach v. Gottschalk Co.*, 418.)

11. **CONTRACTS OF LUNATICS.**—A contract made with a lunatic, fairly and in good faith, when the other party is ignorant of the disability, cannot be repudiated by the lunatic after he has had the benefit of it, unless both parties, upon a rescission, can be restored to the situation they originally occupied. (*Flach v. Gottschalk Co.*, 418.)

12. CONTRACTS OF LUNATICS—NOTICE.—An inquisition of lunacy is notice, actual or constructive, to all parties dealing with the lunatic, and after such inquisition a contract made with the lunatic is void and unenforceable. (*Flach v. Gottschalk Co.*, 418.)

13. CONTRACTS OF LUNATICS—COMPETENCY OF AGENT AS WITNESS.—If a contract is made between an agent on behalf of his corporation and a person subsequently declared insane, such agent is not a party to the contract and is competent as a witness in an action thereon, although the statute provides that one party to a contract is incompetent to testify if the other party thereto is insane. (*Flach v. Gottschalk Co.*, 418.)

14. CONTRACTS—ENFORCEMENT OF UNLAWFUL.—Courts cannot lend their aid to the enforcement of unlawful contracts. (*Swing v. Munson*, 772.)

15. CONTRACTS—CONSTRUCTION—CIRCULAR OF BUILDING AND LOAN ASSOCIATION.—The construction of a written instrument is a question of law to be decided by the court. Hence, it has the right to construe a circular of a building and loan association upon the faith of which stock has been bought in the concern. (*Williamson v. Eastern Building etc. Assn.*, 822.)

16. CONTRACTS—CONSTRUCTION—INTERPRETATION OF PARTIES.—When the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract by the parties themselves is entitled to great weight. (*Williamson v. Eastern Building etc. Assn.*, 822.)

17. CONTRACTS—CONFLICT OF LAWS—PRESUMPTION.—In an action on a contract made in another state, the law of that state is presumed to be the same as that in which the action is brought. (*Burgess v. Western Union Tel. Co.*, 833.)

18. CONTRACTS — UNREASONABLE STIPULATIONS.—The state legislature may, within just and reasonable bounds, declare certain stipulations in specified contracts unreasonable and void. (*Burgess v. Western Union Tel. Co.*, 833.)

19. CONTRACTS—ILLEGAL.—Courts cannot aid in the enforcement of contracts clearly illegal. (*Wiggins v. Bisso*, 837.)

20. CONTRACTS—CONSIDERATION—SETTLEMENT OF ACTION—DURESS.—The settlement of an action, either begun or threatened, unless founded on a fraudulent or fictitious claim, is a valid consideration for promises by a third party to pay the claim, and the service, or threatened service, of an attachment in such action is not duress. (*Bolin v. Metcalf*, 898.)

See Building and Loan Associations, 5, 7; Insurance, 6, 11-13; Judicial Sales, 7; Pleading, 2; Suretyship, 10.

CONVEYANCES.

CONVEYANCES—COVENANTS RUNNING WITH LAND—WATER POWER RIGHTS.—If a party owning a mill and elevator situated upon adjoining tracts of land, the elevator being operated by water power from the mill race conducted to the elevator by machinery connected with and part of the mill tract, sells and conveys the elevator and tract of land on which it is situated, together with a grant of perpetual water power to operate the elevator, and a perpetual use of all machinery necessary to the successful application of the water power to such purpose, such grant conveys not only a license to use the water power, but the right to have that power delivered so as to operate the elevator without further cost than the purchase price paid. Such grant is a covenant running

with the land, and a subsequent purchaser of the mill and mill tract of land is obliged to fulfill the covenant. If the mill and machinery are destroyed by fire subsequently to the grant, it is still the duty of the owner of the servient estate to continue to furnish the water power for the elevator. (*Hottell v. Farmers' Protective Assn.*, 109.)

See Homestead, 1, 2.

CORPORATIONS.

1. CORPORATIONS, INSOLVENT—CREDITOR'S RIGHT TO DIVIDENDS IS NOT DIMINISHED BY HIS RECOVERY FROM STOCKHOLDERS.—The fact that a creditor of an insolvent corporation has maintained actions against, and coerced payments from, some of its stockholders does not impair his right to participate in dividends declared by such corporation while in liquidation, provided the amounts collected by him from both sources do not exceed the aggregate due him from the corporation. (*Sacramento Bank v. Pacific Bank*, 36.)

2. CORPORATIONS — INSOLVENCY — DISPENSATION OF FUNDS—STOCKHOLDER'S RIGHT TO SHARE IN DIVIDENDS. The funds of an insolvent corporation are all to be dispensed solely for the benefit of its creditors, and a stockholder is not permitted to share in its dividends either by subrogation or otherwise. (*Sacramento Bank v. Pacific Bank*, 36.)

3. CORPORATIONS—DOUBLE LIABILITY OF STOCKHOLDER—RECOVERY OF PAYMENTS MADE—SUBROGATION. A stockholder of a corporation is answerable to it for assessments in the full amount of his subscription to the capital stock of the corporation for the payment of creditors of the corporation, and he is also individually answerable to each creditor for such proportion of the latter's claim as the amount of stock held by such stockholder bears to the whole of the capital stock. These two liabilities and the remedies based thereon are concurrent. Hence, no part of whatever he has paid, either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, can be recovered back by him, either by subrogation or otherwise. (*Sacramento Bank v. Pacific Bank*, 36.)

4. GOODWILL OF CORPORATION—TRANSFER OF BY STOCKHOLDER.—A stockholder of a corporation cannot transfer its goodwill, even if goodwill, as property, pertains to a corporation. (*Merchants' Ad-Sign Co. v. Sterling*, 94.)

5. GOODWILL OF CORPORATION—SALE OF, BY STOCKHOLDER—ESTOPPEL.—Although a stockholder in a corporation pretends to dispose of the goodwill of the corporate business, with a sale of his stock, yet the vendee must be presumed to know that he has no vendible interest in such goodwill. The vendor, therefore, is not estopped from denying the existence of such interest. (*Merchants' Ad-Sign Co. v. Sterling*, 94.)

6. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—CERTIFICATES OF DEPOSIT—EVIDENCE.—In an action to enforce the statutory liability of stockholders of an insolvent banking corporation for its debts, upon certificates of deposit negotiable and transferable by indorsement, they must be produced in evidence to show their present ownership, or must be shown by competent evidence to be lost or destroyed, and the necessity for such proof is not dispensed with by showing a list of verified claims presented to the assignee of the corporation and allowed by the court, including the certificates of deposit in question upon which dividends have been ordered paid. Such allowance

does not constitute a judgment in personam against the bank or its stockholders, and is at most a judgment in rem fixing the status of the claimant toward the assigned property, and establishing his right to participate in the benefits of the assignment. (*Zang v. Wyant*, 145.)

7. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—PARTIES.—In an action to enforce the statutory liability of the stockholders of an insolvent banking corporation for its debts, the fact that the bank and its assignee are not made parties defendant does not in any manner affect the rights or liabilities of such stockholders. (*Zang v. Wyant*, 145.)

8. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—EVIDENCE TO ESTABLISH.—In an action to enforce the statutory liability of the stockholders of an insolvent banking corporation for its debts, the pass-books issued to depositors are no better evidence than the entries made in the balance-book of the bank from deposit slips made at the time of deposit, and though such entries are made by an officer of the bank, yet in making them he acts as agent for the stockholders and the entries are as binding upon them as upon the bank. (*Zang v. Wyant*, 145.)

9. CORPORATIONS—INSOLVENCY—REMEDY—LIABILITY OF STOCKHOLDERS.—A suit in equity by a creditor or creditors for the benefit of all the creditors is the proper remedy to enforce the liability of stockholders in an insolvent corporation for the debts thereof. Neither the assignee nor receiver of an insolvent corporation can maintain such suit unless given the right by statute. (*Zang v. Wyant*, 145.)

10. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—WHEN MAY BE ENFORCED.—If an insolvent corporation makes an assignment for the benefit of its creditors, they are not required to await the collection and disposition of all doubtful claims and assets of the corporation before bringing action to enforce the stockholders' statutory liability. The stockholders must pay promptly and take upon themselves the onus of delay and risk as to such claims. (*Zang v. Wyant*, 145.)

11. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—CONSTRUCTION OF STATUTE.—Under a statute imposing upon the stockholders in a corporation a liability for its debts "in double the amount of the par value of the stock owned by them respectively," they are liable in such double amount in addition to their subscription to the stock, no matter whether they have paid or are still indebted therefor. Such liability imposed for the benefit of creditors, is in addition to any liability of the stockholder to the corporation for his subscription for stock. (*Zang v. Wyant*, 145.)

12. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS FOR INTEREST.—If, from the nature of a contract or debt of an insolvent corporation, interest is allowable against it, that constitutes a part of its indebtedness, for which the stockholders are liable. (*Zang v. Wyant*, 145.)

13. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—EVIDENCE.—The relation of stockholders to an insolvent corporation as stockholders is sufficiently shown by the production in evidence of the stock-book of the corporation and the testimony of its assignee, who had been its cashier, that such book represented the stockholders, was the only book kept for that purpose, that it was kept in the ordinary course of business, and that the persons named therein took part in the stockholders' meetings during the period of time that their names appeared on the book. (*Zang v. Wyant*, 145.)

14. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—BOOKS AS EVIDENCE.—In an action to enforce the stockholders' statutory liability for the debts of an insolvent corporation, the books of the corporation, kept by its employes in conducting its business, are admissible in evidence. (*Zang v. Wyant*, 145.)

15. CORPORATIONS—INSOLVENCY—LOAN TO.—A loan made in good faith by a director and a third person to an insolvent corporation may be validly secured by a mortgage on the corporate property. (*Millsaps v. Chapman*, 547.)

16. CORPORATIONS—LIABILITY OF DIRECTORS.—If a director in a corporation resigns, buys the corporate property shortly thereafter, and is then re-elected a director, he is liable as though he were a director when the property was purchased. (*Millsaps v. Chapman*, 547.)

17. CORPORATIONS—LIABILITY OF DIRECTORS—RESIGNATION—RE-ELECTION.—If a director in a corporation is re-elected, serves his term, attends meeting, receiving pay therefor, then resigns, but accepts re-election three months thereafter, and permits himself to be advertised as a director during the entire time, he must be held liable as a director during the entire period, within the rule preventing a director in an insolvent corporation from purchasing its property and paying therefor in the stock of the corporation. (*Millsaps v. Chapman*, 547.)

18. CORPORATIONS—INSOLVENCY—PURCHASE BY DIRECTOR.—At the option of an insolvent corporation, or of its creditors, a sale of the corporate property to a director may be set aside, and he may be treated as a trustee for the corporation. (*Millsaps v. Chapman*, 547.)

19. CORPORATIONS—INSOLVENCY—PURCHASE BY DIRECTOR.—If a contract of purchase of corporate property is made between an insolvent corporation and its director, such contract may be wholly annulled, if actual fraud entered into it, and the director may be denied any reimbursement, and, if not corrupted by fraud, the court may vacate or uphold the purchase, and in either event may require the director to account for profits, or the difference between the price actually paid and the real value at the time of the purchase. The remedy must be molded to fit the circumstances of each case. (*Millsaps v. Chapman*, 547.)

20. CORPORATIONS—FOREIGN — CREDITORS—DOMESTIC AND FOREIGN—STATUTES—CONSTRUCTION OF.—The statute of South Carolina does not give to the creditors of an insolvent foreign corporation who reside in that state the right to appropriate to their claims corporate assets in that state, to the exclusion of citizens of other states, who are also creditors. (*Wilson v. Keels*, 816.)

See Damages, 8; Pleading, 1; Pledge, 6; Statutes, 5-7; Water and Watercourses, 3.

COTENANCY.

1. COTENANCY—LIEN FOR IMPROVEMENTS.—If a cotenant expends money in making improvements on the common estate, at the request of his cotenants and for their benefit, he is entitled to a lien therefor upon the shares of such cotenants. (*Williams v. Harlan*, 394.)

2. COTENANCY—LIEN OF THIRD PERSON FOR IMPROVEMENTS.—If a third person lends money to a cotenant, to be ex-

pended in making permanent improvements on the common estate at the request of the other cotenants, and such improvements are made, the lender is subrogated to the rights of the borrowing cotenant and is entitled to a lien on the property for the amount so expended. (*Williams v. Harlan*, 394.)

3. COTENANCY—ENFORCING LIEN FOR IMPROVEMENTS—PARTIES.—In an action to subject land held in cotenancy to a lien for improvements made thereon with money loaned by a third person, a cotenant, who has parted with all his interest to a trustee for creditors is not a necessary party. (*Williams v. Harlan*, 394.)

4. COTENANCY — LIEN FOR IMPROVEMENTS — INJUNCTION.—An action for an injunction may be maintained to restrain a contemplated partition of land held in cotenancy, whereby the lien of a third person for money loaned by him for improvements made on the common property by the cotenants may be destroyed. (*Williams v. Harlan*, 394.)

5. COTENANCY—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.—The purchase by a cotenant of an outstanding title to or encumbrance on the joint estate inures to the common benefit and entitles the purchaser to contribution. (*Carson v. Broady*, 691.)

6. COTENANCY—LEASE—PRESUMPTION.—If a cotenant leases the whole property, and remains in possession after the termination of his term, discharging the obligations imposed upon him by the lease, he is presumed to hold under the lease, or an implied renewal thereof, and subject to its provisions. (*Carson v. Broady*, 691.)

7. COTENANCY — IMPROVEMENTS — PARTITION.—If one tenant in common has had exclusive possession of the common property, and has made valuable improvements thereon without the consent of his cotenant, there should, in partition, be set apart to him that portion on which the improvements are made, if this can be done without prejudice to the cotenant, but if the property is not susceptible to physical division it should be sold and the proceeds divided equally among the cotenants, after deducting therefrom, for the benefit of the tenant in possession, such sum as the salable value has been enhanced by such improvements. (*Carson v. Broady*, 691.)

8. COTENANCY—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.—The purchase of an outstanding title or encumbrance to property by a party before he becomes a cotenant therein does not entitle him to contribution, when the purchase is not made actually or constructively for the benefit of any future cotenant. (*Carson v. Broady*, 691.)

COUNTIES. •

See Judgment, 13, 14.

COURTS.

COURTS—POWER OF, AFTER CAUSE IS REMANDED, WITH DIRECTIONS—JUDGMENT.—If an appellate court remands a cause, with directions "to enter judgment for the plaintiff" in a certain amount, the lower court has no judicial discretion in the premises. It has no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed. (*Tourville v. Wabash R. R. Co.*, 650.)

See Judges.

CRIMINAL LAW.

1. CRIMINAL LAW—ACTS OF ACCOMPLICES—ADMISSIBILITY.—The acts and conduct of one accomplice, during the pendency of the criminal act, not alone in its actual perpetration, but also in its subsequent concealment, are admissible in evidence against another accomplice. (*Carter v. State*, 262.)

2. CRIMINAL LAW—INDICTMENT—SUFFICIENCY.—An entire omission from an indictment of the following words embodied in the form prescribed by statute for such instruments, namely, "contrary to the laws of said state, the good order, peace and dignity thereof," is a material defect, which may be taken advantage of by special demurrer before trial. Such statutory words are mandatory and not merely declaratory. (*Hardin v. State*, 269.)

3. CRIMINAL LAW—FLIGHT—PRESUMPTION OF GUILT. Flight or attempted flight of the accused before his arrest is at most only a circumstance to be considered by the jury with the reasons that prompted it, tending to show guilt, or by which an inference of guilt may be raised, and it has no probative force unless it appears that the accused fled to avoid arrest. Flight of the accused by itself does not authorize the jury to presume guilt. (*Smith v. State*, 286.)

4. CRIMINAL LAW—PROFANITY, WHAT CONSTITUTES.—To constitute profanity, it is not necessary that the name of the Deity should be used. (*State v. Wiley*, 531.)

See Arrest; Arson; Homicide; Trial, 7.

DAMAGES.

1. DAMAGES—AMOUNT OF RECOVERY—STIPULATION.—In an action to recover damages, recovery to a date subsequent to the time of bringing the action may be permitted if the parties have stipulated to that effect in case any damages are awarded. (*Hottell v. Farmers' Protective Assn.*, 109.)

2. DAMAGES—MEASURE OF.—In an action to recover for wrongfully preventing the use of water power for an elevator, the cost of substituting steam power is the proper measure of damages. (*Hottell v. Farmers' Protective Assn.*, 109.)

3. DAMAGES—EVIDENCE.—All the attending acts and circumstances, which accompany and give character to an assault, may be given in evidence to enhance the damages. (*Maisenbacker v. Society Concordia*, 213.)

4. DAMAGES—MENTAL SUFFERING.—Mental as well as physical suffering, when properly alleged, may be proved as an element of actual damage, and as naturally and directly resulting from an assault. (*Maisenbacker v. Society Concordia*, 213.)

5. DAMAGES.—PUNITIVE damages, which are awarded with the view of punishing the defendant for his wrongful act, may be recovered in Connecticut. (*Maisenbacker v. Society Concordia*, 213.)

6. DAMAGES—PUNITIVE—WHEN ALLOWED.—The cases in which punitive damages may be awarded are only those actions of tort, founded on the malicious or wanton misconduct of the defendant, or upon such culpable neglect of the defendant, as is tantamount to malicious or wanton misconduct. (*Maisenbacker v. Society Concordia*, 213.)

7. DAMAGES—PUNITIVE—AGENCY.—No recovery of exemplary damages can be made against a principal for the tort of an agent or servant, unless the defendant expressly authorized the act as it was performed, or approved it, or was grossly negligent in

hiring the agent or servant. (*Maisenbacker v. Society Concordia*, 213.)

8. **DAMAGES—PUNITIVE.—PRIVATE CORPORATIONS**, as well as individuals, may for their own acts become liable in punitive damages. (*Maisenbacker v. Society Concordia*, 213.)

9. **DAMAGES.—EXPENSES OF LITIGATION** are not an element of the damages, termed in law actual or compensatory, and can only be considered in those cases in which exemplary damages may be awarded. (*Maisenbacker v. Society Concordia*, 213.)

10. **DAMAGES.—THE AMOUNT OF PUNITIVE DAMAGES** which can be awarded, in a proper case, is limited to the expenses of litigation in excess of taxable costs. (*Maisenbacker v. Society Concordia*, 213.)

11. **DAMAGES—MASTER AND SERVANT.—A master is liable** for compensatory damages for injuries caused by the negligence of the servant within the scope of his employment. (*Maisenbacker v. Society Concordia*, 213.)

12. **DAMAGES—MASTER AND SERVANT—AGENCY.—A principal** cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. (*Maisenbacker v. Society Concordia*, 213.)

13. **DAMAGES.—PHYSICAL AND MENTAL SUFFERING** may be considered in awarding damages in an action for personal injuries. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

14. **DAMAGES—MEASURE OF—COMPENSATION FOR PERSONAL INJURIES.—In an action for personal injuries**, the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

15. **DAMAGES—EXERCISE OF LEGAL RIGHT.—If a person**, in the exercise of a legal right, more especially one conferred by express statute, does an injury to another's property, he is not liable for damages, unless caused by his want of the care and skill ordinarily exercised in similar cases. This rule is applicable where the right of passage in a navigable stream is involved. (*Coyne v. Mississippi etc. Boom Co.*, 508.)

16. **DAMAGES—LOSS OF CREDIT.—For the loss of financial credit and standing through the wrongful act of another**, a person may recover whatever pecuniary damages he can prove he has sustained thereby. (*Kyd v. Cook*, 661.)

17. **DAMAGES—INSTRUCTIONS.—The trial court is bound to** instruct the jury, whether requested or not, upon the material issues of the case, but it is not bound to formulate or prescribe a method of computation which the jury should pursue in estimating damages. (*Kyd v. Cook*, 661.)

See Attachment, 7-11; Negligence, 17, 18; Services, 4.

DEBT.

See Municipal Corporations, 12-22.

DEEDS.

1. **DEEDS—REGISTRATION—NOTICE.—Registry of a deed is** notice only to those who claim under or through the grantor. (*White v. McGregor*, 875.)

2. **DEEDS—REGISTRATION—NOTICE.—The registration of a** sheriff's deed to the property of a certain person is not notice to a subsequent purchaser from one claiming title under a convey-

ance made by such person prior to the sheriff's sale and deed. (White v. McGregor, 875.)

3. DEEDS—REGISTRATION — NOTICE OF FRAUD—PRESUMPTION.—A purchaser who buys land after registration of a sheriff's deed thereof, from one claiming under a conveyance made by the debtor prior to such sheriff's sale of his land, is not, in the absence of actual knowledge of the sheriff's sale and deed, put on inquiry, nor presumed to know that the sheriff's sale was made under a claim that such prior conveyance by the debtor was in fraud of his creditors. (White v. McGregor, 875.)

4. DEEDS—REGISTRATION—SUBSEQUENT PURCHASERS. Under a statute declaring a deed not duly recorded void as against subsequent purchasers for value without notice, such purchasers are those only the origin of whose title is subsequent to the title of the grantee in the recorded deed. (White v. McGregor, 875.)

See Estate, 2; Evidence, 10; Husband and Wife, 3; Judgment, 9; Taxation, 8.

DEFINITIONS.

"Adequate Provocation." (State v. Grugin, 553.)

"Burden of Proof." (Baxter v. Camp, 169.)

"Proximate Cause." (Maryland Steel Co. v. Marney, 441.)

DEPOSITIONS.

1. DEPOSITIONS.—OBJECTIONS TO DEPOSITIONS must be made and disposed of before trial. (Bent Otero Improvement Co. v. Whitehead, 140.)

2. DEPOSITIONS — REFUSAL TO TESTIFY — CONTEMPT—HABEAS CORPUS.—A witness is entitled to be discharged on habeas corpus when he has been committed for contempt by a notary public or other officer for refusing to testify to facts for the purposes of a deposition that are incompetent and inadmissible in evidence, and detrimental to his business. (Ex parte Jennings, 720.)

DEVISE.

See Trusts, 15.

DISTRESS.

See Process.

DOGS.

DOGS—PROPERTY IN—ACTION FOR INJURY OR LOSS. An owner of dogs has such a property in them as will support a civil action for their injury or loss, as where they are run over by the cars on a railroad track, and are injured or killed. (Salley v. Manchester etc. R. R. Co., 810.)

DURESS.

1. DURESS BY THREATS—WHAT CONSTITUTES.—To constitute duress by threats they must be such as would naturally excite such a fear, grounded upon reasonable belief, that the person who threatens has present means of carrying his threats into execution, as would overcome the will of a person of ordinary courage. The mere fact that a person has entered into a contract under the influence of a threat does not necessarily constitute duress. (Barrett v. Mahnken, 953.)

2. DURESS—WHAT CONSTITUTES.—Duress by threats exists only when such threats excite a fear of some grievous wrong, as of death, or great irremediable injury, or unlawful imprisonment, about to be then and there, or at least very shortly, inflicted. (*Barrett v. Mahnken*, 953.)

See Contracts, 20; Negotiable Instruments, 8.

EJECTMENT.

EJECTMENT—MISNOMER OF PARTY—JUDGMENT AS EVIDENCE.—If, in an action of ejectment, the plaintiff shows the record title to the property to be in one "John O'Shea," a judgment in plaintiff's favor against "John O. Shea," based on service by publication and determining adverse claims in the land, is not admissible in evidence to show a link in plaintiff's chain of title, as it cannot be presumed that "O'Shea" and "Shea," are one and the same names. (*Clary v. O'Shea*, 465.)

EMINENT DOMAIN.

See Railroads, 11, 12.

EQUITY.

See Associations, 5, 6; Trusts, 12; Wills, 2.

ESTATES.

1. LIFE TENANT AND REMAINDERMAN—LIABILITIES OF.—It is the nature, object and result, rather than the amount of an expenditure, which usually determines whether it is chargeable to a life tenant or to the remainderman. (*Wordin's Appeal*, 219.)

2. ESTATES—CONTINGENT REMAINDERS—BARRING OF, BY LIFE TENANT—DEED OF FEOFFMENT WITH LIVERY OF SEISIN—CONSTITUTIONAL LAW.—A STATUTE which provides that contingent remainders shall not be barred by deed of feoffment with livery of seisin is not unconstitutional, on the ground that it impairs the obligation of a contract, or on the ground that it is forbidden, retroactive legislation. (*People's Loan etc. Bank v. Garlington*, 800.)

3. ESTATES—CONTINGENT REMAINDERS—BARRING OF, BY LIFE TENANT—WHAT STATUTE IS NOT RETROACTIVE. A statute which provides that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment, with livery of seisin," applies to every contingent remainder, whether created before or after the passing of the act. It plainly forbids such future action by a life tenant, and, when applied to a right or privilege existing before, but not exercised until after, its enactment, is not retroactive in its effect. (*People's Loan etc. Bank v. Garlington*, 800.)

4. CONSTITUTIONAL LAW—VESTED RIGHTS IN STATUTORY PRIVILEGES.—Even where a life tenant has the statutory right or privilege to bar contingent remainders by a deed of feoffment with livery of seisin, he may be deprived of it, by subsequent legislation, where he has never attempted to exercise it, without violating vested rights, for no citizen has a vested right in statutory privileges or exemptions. (*People's Loan etc. Bank v. Garlington*, 800.)

5. CONSTITUTIONAL LAW—VESTED RIGHT TO DO A WRONG.—The doctrine that a life tenant may, by a deed of feoffment, with livery of seisin, bar contingent remainders, had its origin

under the feudal system, and is generally regarded as a means of doing a wrong to the contingent remainderman, and always defeats the intention of the testator where such remainders are created by will. Hence, it cannot be said that a life tenant, though authorized by statute to bar contingent remainders in this way, has any vested right to do a wrong to the contingent remainderman by defeating the expressly declared intention of a testator. (*People's Loan etc. Bank v. Garlington, 800.*)

6. ESTATES—CONTINGENT REMAINDER—BAR OF, BY DEED OF FEOFFMENT WITH LIVERY OF SEISIN.—At common law, a tenant for life could not bar contingent remainders by a deed of feoffment, with livery of seisin, unless he held the legal title. (*People's Loan etc. Bank v. Garlington, 800.*)

7. ESTATES—CONTINGENT REMAINDERS—WHEN NOT BARRED BY LIFE TENANT.—Contingent remainders, created by a will, are not barred or destroyed by a life tenant's deed of feoffment, with livery of seisin, where the legal title is in the executors, and not in the life tenant, or where the latter's power to so bar contingent remainders has been taken away by statute. (*People's Loan etc. Bank v. Garlington, 800.*)

ESTATES OF DECEDENTS.

See Homestead, 3; Judgment, 2-4

ESTOPPEL.

See Corporations, 5; Landlord and Tenant, 1; Municipal Corporations, 7, 8; Partition; Receivers, 10; Statutes, 17.

EVIDENCE.

1. EVIDENCE—EXPERT TESTIMONY.—After a witness has testified what is the right and what the wrong way to run a stope in a mine, and how the particular stope in question was run, and has accurately described the place in which plaintiff was working at the time of an accident, it is error to permit such witness to answer a hypothetical question based upon such testimony, whether he considers such stope, thus made, an ordinarily safe place for a man to work in. The jury are just as well qualified to determine such question as the witness, and, in such case, opinion evidence is not admissible. (*Smuggler Union Min. Co. v. Broderick, 106.*)

2. EVIDENCE—EXPERT TESTIMONY.—If the question under consideration is one concerning which jurors of ordinary capacity, experience, and accomplishments, such as are possessed by the average man, are competent to decide, the opinion of an expert is not admissible. (*Smuggler Union Min. Co. v. Broderick, 106.*)

3. EVIDENCE—ACCOUNT BOOKS.—In order to render account books admissible in evidence to show admissions against the party making them, it is only necessary that they be shown to be his books, kept in the regular course of business, and that entries therein were made by himself or an agent, authorized to make them. (*Zhang v. Wyant, 145.*)

4. EVIDENCE—EXPENSES OF FUNERAL AND LAST ILLNESS.—In an action by a son upon a contract made by the defendant with his deceased wife to pay her son a certain sum of money upon her death, testimony as to what the defendant had expended for the charges of his wife's last sickness and of her funeral, and of his narrow means, is properly excluded as not being within the issue. (*Baxter v. Camp, 169.*)

5. EVIDENCE—ORAL DECLARATIONS OF DECEASED.—A statute, permitting relevant declarations of a deceased to be given in evidence, applies only in favor of those who sue or defend in the interest of the estate, either as personal representatives, heirs, and distributees, or purchasers by will; it does not embrace purchasers by contract. (*Baxter v. Camp*, 169.)

6. EVIDENCE — SELF-INCRIMINATING — ADMISSIBILITY. Evidence that an accused person, not under arrest, was compelled, against his consent, to put his hand in his pocket and surrender a pistol, is not admissible on his trial for the offense of carrying a concealed weapon, when the constitution of the state provides "that no person shall be compelled to give testimony tending in any manner to criminate himself." (*Evans v. State*, 276.)

7. EVIDENCE— SELF-INCRIMINATING — ADMISSIBILITY. Evidence of guilt found upon a person under legal arrest may be used in evidence against him, but if a person not in legal custody is compelled to furnish incriminating evidence against himself, such evidence is not admissible under a constitutional provision that "no person shall be compelled to give testimony tending in any manner to criminate himself." (*Evans v. State*, 276.)

8. EVIDENCE—SECONDARY PROOF OF WRITING—WANT OF NOTICE TO PRODUCE.—If one asserts for the first time at the trial that a certain written instrument exists, and is in the possession of the opposite party, the former is not allowed to prove its contents by secondary evidence without having given any notice to produce it, although the opposite party denies that such writing ever existed. (*Clary v. O'Shea*, 465.)

9. EVIDENCE—ADMISSIONS—OPENING STATEMENTS.—A defendant is bound by his counsel's admission, in his opening statement, that the plaintiff is the owner of the note on which suit is brought. (*Pratt v. Conway*, 602.)

10. EVIDENCE.—A CERTIFIED COPY OF A DEED IS ADMISSIBLE in evidence upon proof of the loss of the original. (*Pratt v. Conway*, 602.)

11. EVIDENCE.—DECLARATIONS OF A VENDOR, made after conveyance, and while in the actual possession of the property, concerning the objects, intents, and purposes of the conveyance, are admissible in evidence as part of the *res gestae* when the conveyance is assailed as fraudulent. If he is not in possession, such declarations are admissible in such case as tending to establish the intent with which he made the conveyance, but not to disparage the vendee's title. (*Kyd v. Cook*, 661.)

12. EVIDENCE—DECLARATIONS AGAINST TITLE.—Declarations by a vendor's vendor in disparagement of the vendee's title, made while the original vendor was out of the possession of the property, and not in the presence of the vendee, are hearsay and not admissible in evidence. (*Kyd v. Cook*, 661.)

See Appeal, 5, 7, 9, 11; Attachment, 11; Contracts, 8; Corporations, 6, 8, 13, 14; Criminal Law, 1; Damages, 3; Ejectment; Forgery, 5; Judgment, 12; Negligence, 3; Negotiable Instruments, 1, 2, 5; Pledge, 2; Shipping, 2, 3; Trusts, 1; Wills, 1.

EXECUTION.

1. EXECUTION—JUDGMENT AGAINST WIFE—WHAT MAY NOT BE SOLD.—Neither the separate property of a husband nor community property can be sold upon an execution on a judgment, obtained individually against his wife. (*Svetinich v. Sheean*, 50.)

2. EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONSTITUTIONALITY OF STATUTES AUTHORIZING.—Statutes which provide for proceedings supplementary to execution against persons having property of the judgment debtor are not unconstitutional on the ground that no provision is made for notice to the judgment debtor and no opportunity given him to be heard. (*Coffee v. Haynes*, 99.)

3. EXECUTION—SUPPLEMENTARY PROCEEDINGS—GARNISHMENT OF PROPERTY NOT IN CUSTODY OF LAW.—Money obtained by a chief of police of a person arrested for murder, not at the time of his arrest, or from his person, but after the arrest, from the cabin of the prisoner, who told the chief where to find the money, is not property in custodia legis, although in the custody of an officer of the law, where it had no connection whatever with the cause of the arrest, and was not necessary for any purpose as evidence. The chief, in such a case, is neither more nor less than the bailee of the prisoner, and such money may, therefore, be reached by garnishment. (*Coffee v. Haynes*, 99.)

4. EXECUTION—SUPPLEMENTARY PROCEEDINGS—CIVIL DEATH—SUBJECTION OF CONVICT'S PROPERTY TO PAYMENT OF DEBTS.—Civil death is not identical with physical death, and a life sentence of a convict does not, under the statutes of California, interfere with the disposition of his property, or the taking of it to pay his debts. Hence, a court has jurisdiction to enforce an execution against the property of a defendant in an action, who has been sentenced to the state prison for life, on a charge of murder, though the judgment, in the civil action, was not entered against him until after his civil death. (*Coffee v. Haynes*, 99.)

5. EXECUTION — SUPPLEMENTARY PROCEEDINGS—INSUFFICIENCY OF AFFIDAVIT FOR EXAMINATION OF GARNISHEE—WAIVER OF.—A garnishee, who appears and answers, and proceeds to a hearing, upon a citation issued on an affidavit for an order for the examination of himself, as garnishee, thereby waives any objection to the insufficiency of the affidavit. (*Coffee v. Haynes*, 99.)

6. EXECUTION—SUPPLEMENTARY PROCEEDINGS—AFFIDAVIT FOR EXAMINATION OF GARNISHEE—SUFFICIENCY OF.—An affidavit for an order for the examination of a garnishee, containing a statement, substantially in the language of the statute, that he "has property of said judgment debtor," is sufficient to show that the garnishee has such property. Such statement is not a mere conclusion of law. (*Coffee v. Haynes*, 99.)

7. EXECUTION—INTEREST TOO REMOTE.—Where a testator left property to his wife for life, and after her death to be divided equally between two sons, and if either son should die before the decease of his wife, leaving lawful issue, such issue should inherit in the place of the parent so deceased, the interest in remainder which such sons acquired is too remote and uncertain to be subject to attachment. (*Smith v. Gilbert*, 163.)

8. EXECUTION—INTEREST SUBJECT TO.—Under a statute providing that execution may run against "goods or lands" of the defendant, an interest which may be strictly neither goods nor land, but which is nevertheless clearly property, capable of being fairly sold and appraised, and which is subject to the debtor's control, is attachable property. (*Smith v. Gilbert*, 163.)

9. EXECUTION—ATTACHMENT OF UNCERTAIN INTEREST.—An uncertain interest in property, incapable of just appraisal, and possibly of no value, is not subject to attachment. (*Smith v. Gilbert*, 163.)

10. **EXECUTION.**—In Connecticut no estate in land can be taken on execution, unless at its "true value;" hence an interest, the true value of which cannot be ascertained, cannot be taken on execution. (*Smith v. Gilbert*, 163.)

11. **EXECUTION—UNCERTAIN INTEREST.**—The process of foreign attachment is not adapted to secure an interest in property, to the possession and enjoyment of which the defendant may never succeed. (*Smith v. Gilbert*, 163.)

12. **EXECUTIONS—EXCESSIVE LEVY—REMEDY.**—An affidavit of illegality is not a remedy for an excessive levy. (*Pinkston v. Harrell*, 242.)

13. **EXECUTION SALE—SECRET EQUITIES.**—A JUDGMENT CREDITOR, who buys land in good faith, at an execution sale on his own judgment, takes the title thereto clear of any prior secret equities of which he had no notice. (*Pugh v. Highley*, 327.)

14. **EXECUTIONS—PROPERTY SUBJECT TO.**—A crop of peaches or other fruit requiring periodical expense, industry, and attention, in its yield, is *fructus industriales* and subject to execution as personal property. (*State v. Fowler*, 452.)

15. **EXECUTIONS—LEVY UPON GROWING CROP.**—In levying an execution upon a growing crop, a manual taking of possession is not necessary, and a proper notification and indorsement on the levy is sufficient. (*State v. Fowler*, 452.)

16. **EXECUTION SALES—INADEQUATE PRICE—DEFECT IN NOTICE—REDEMPTION.**—A second mortgagee, who redeems from an execution sale, which is prior to both mortgages, cannot be deprived of the rights acquired by his redemption, upon the refunding by the first mortgagee of the amount paid to redeem, although the judgment creditor induced the first mortgagee to believe that the judgment had been paid, and the second mortgagee knew that the property was sold for an inadequate price, and that there was a defect in the notice of sale, but did not participate in the judgment creditor's fraud. In such case, the redemptioner is a *bona fide* purchaser, and cannot be deprived of the property rights acquired under the redemption. (*White v. Leeds Importing Co.*, 488.)

17. **EXECUTION SALES—RIGHT OF MORTGAGEE TO REDEEM.**—A second mortgagee is not bound, because he knows of facts which might render an execution sale of the land upon which he has a lien voidable, to refrain from redeeming from such sale, and hazard his right of redemption on the chance that a suit would be brought to avoid such sale, and prosecuted to a successful determination. (*White v. Leeds Importing Co.*, 488.)

18. **EXECUTION AFTER CAUSE IS REMANDED.**—After the lower court has entered a judgment for the plaintiff in a certain amount, in accordance with the remanding directions of an appellate court, it commits no error in issuing execution on the judgment, nor in overruling the defendant's motion to quash the execution, on the ground that it is erroneous because of a judgment against the defendant, in another state, as garnishee. (*Tourville v. Wabash R. R. Co.*, 650.)

See *Replevin*, 1; *Sheriffs*, 2, 3.

EXECUTORS AND ADMINISTRATORS.

See *Contracts*, 7; *Trusts*, 15.

EXPLOSIVES.

1. **EXPLOSIVES—LIABILITY FOR STORING AND KEEPING.**—One who stores nitroglycerine or other high explosives on

his premises is liable in damages for injuries caused to surrounding persons or property by its explosion, although he is not chargeable with either want of care or an unlawful act in connection with the storage or casualty. (*Bradford etc. Co. v. St. Marys etc. Co.*, 740.)

2. **EXPLOSIVES—STORING AND KEEPING—LIABILITY FOR EXPLOSION.**—One who stores or keeps nitroglycerine or other high explosive on his premises is liable for all injury to surrounding property caused by its explosion, and such liability extends to all property within the circle of danger, whether adjacent to the premises on which the explosive is stored or not. (*Bradford etc. Co. v. St. Marys etc. Co.*, 740.)

EX POST FACTO LAWS.

See Statutes, 12, 13.

FINDINGS.

See Appeal, 1, 8, 9.

FORECLOSURE.

See Jurisdiction; Lien, 5; Mortgages, 8.

FORGERY.

1. **FORGERY—INDORSEMENT OF CHECK.**—If a bank check is in fact a forgery, it is immaterial that it was not properly indorsed so as to pass the title by mere delivery, as it is sufficient if the instrument forged bears such a resemblance to the document it is intended to represent as to effectually deceive. (*Santolini v. State*, 906.)

2. **FORGERY — INDICTMENT—SUFFICIENCY.**—An information or indictment for forgery, or for uttering or passing forged paper, need not set out any indorsements thereon, to show the instrument to be of apparent legal efficacy. It is sufficient to charge that it is a forged writing, and was uttered or passed with knowledge of the forgery, and with intent to defraud. (*Santolini v. State*, 906.)

3. **FORGERY—INFORMATION—SUFFICIENCY.**—An information for forgery, describing the instrument forged according to its purport as a "bank check," if good and sufficient in other respects, is not rendered insufficient because it omits the name of the drawee bank. (*Santolini v. State*, 906.)

4. **FORGERY—INSTRUCTIONS AS TO VARIANCE.**—Failure to instruct the jury that a variance between the name of the maker of a check as alleged in an indictment for forgery, and as signed to the check, is fatal if they are not *idem sonans*, is not reversible error, when no request is made for such instruction. (*Santolini v. State*, 906.)

5. **FORGERY—EVIDENCE—VARIANCE.**—There is no such variance between the name "G. W. Edwards," as averred in an information for forgery, and the name "G. W. Ewareeds," as signed to the alleged forged instrument, as to require the exclusion of the latter as inadmissible in evidence; but the effect of such variance is for the jury to determine, subject to the rule that if such names are not *idem sonans*, the variance is fatal. (*Santolini v. State*, 906.)

6. **FORGERY—VARIANCE IN NAMES.**—The court, in forgery cases, may decide the matter of variance, when the names appearing in the indictment and those appearing in the alleged forged in-

strument are so nearly alike as to be clearly *idem sonantes*, and may also pass upon the question when there is an unmistakable variance, and in the latter case exclude the instrument from the jury or direct an acquittal. (*Santolini v. State*, 906.)

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES—VOLUNTEERS—MALA FIDE PURCHASERS—TRUSTEES.**—A debtor who gives no specific security for the payment of his debts is deemed in equity as holding his property in trust for his creditors, and any conveyance of it by him, without consideration, or *mala fide*, though upon consideration, is void as to his creditors, and, as to them, he is considered the owner of such property, and all grantees thereof, who take as volunteers, or without consideration, or who take with notice of the trust, are in equity trustees *ex maleficio* of such property, and may be made to answer to creditors for it or for its value. (*Ames v. Dorroh*, 522.)

2. **FRAUDULENT CONVEYANCES—EXISTING INDEBTEDNESS WHEN NOT CONSIDERATION.**—Although the grantor is indebted to the grantee at the time of the execution of a deed, this does not constitute a consideration for the deed, unless the grantee assents that the conveyance shall go in satisfaction of the debt. (*Ames v. Dorroh*, 522.)

3. **FRAUDULENT CONVEYANCES—BURDEN OF PROOF.**—If a debtor is unable to pay a debt when called upon by his creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyance of his property is fraudulent and void, and the burden of proof is upon his grantee to show that the debtor, at the time of the conveyance, retained other specific property readily accessible, and ample for the discharge of all his debts. (*Ames v. Dorroh*, 522.)

4. **FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS.**—If conveyances are set aside as fraudulent as to existing creditors, such conveyances must also fail as to subsequent creditors. (*Ames v. Dorroh*, 522.)

5. **FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.** A voluntary conveyance from a husband to his wife is void as to his sureties on his previously executed official bond for all defaults occurring during the term for which the bond is given. (*Ames v. Dorroh*, 522.)

6. **FRAUDULENT CONVEYANCES—PURGING FRAUD.**—A conveyance fraudulent as to creditors of the grantor when executed is not purged of the fraud, though the grantee remains in possession and pays debts of the grantor in excess of the value of the property. (*Caldwell v. Walker*, 545.)

7. **FRAUDULENT CONVEYANCES—PURGING FRAUD.**—A fraudulent conveyance may be abandoned and a new conveyance made in good faith before the rights of third persons have intervened, and the latter conveyance may be valid, but there can be no *ex post facto* purgation of fraud. (*Caldwell v. Walker*, 545.)

8. **FRAUDULENT CONVEYANCES—VOLUNTARY DEED—SUBSEQUENT CREDITORS.**—A voluntary deed made by a debtor cannot be set aside at the instance of a subsequent creditor, who has notice, either actual or constructive, without some proof of actual, moral fraud. (*Gentry v. Lanneau*, 814.)

9. **FRAUDULENT CONVEYANCES—ATTACK ON VOLUNTARY DEED BY SUBSEQUENT CREDITOR—IRREBUTTABLE**

PRESUMPTION.—When a subsequent creditor, with notice, attacks a voluntary deed made by his debtor, there is no irrebuttable presumption of fraud arising from the fact of indebtedness at the time, and that the transfer was without consideration. The question of fraud must be determined from all the circumstances of the case. (*Gentry v. Lanneau*, 814.)

See Statutes, 1.

GARNISHMENT.

See Attachment, 1-6; Execution, 3, 5, 6.

GIFTS.

GIFTS CAUSA MORTIS—RECOVERY OF DONOR—FAILURE OF GIFT.—If a husband is sick, and makes a deed of gift of personal property used in his business to his wife, to secure it to her in the event of his death, the gift is ineffective where the husband recovers and uses the property in his business, in the same manner, and at the same place as before his sickness. (*O'Kane v. Whelan*, 42.)

GOODWILL.

See Contracts, 1; Corporations, 4, 5.

GRAND JURY.

1. **TRIAL—GRAND JURY—DISQUALIFICATION OF MEMBER—EFFECT ON INDICTMENT.**—If a grand jury is composed of not less than sixteen, and not more than twenty-three, members, as required by statute, the fact that one member is disqualified does not vitiate the action of the jury in finding an indictment, if the disqualified juror is excused before the charge is considered, and the remaining jurors, not less than sixteen, find the indictment, twelve of their number concurring therein. (*State v. Cooley*, 502.)

2. **TRIAL—GRAND JURY—NUMBER OF JURORS.**—If the statute requires that a grand jury be composed of not less than sixteen members, and not more than twenty-three, a defendant cannot complain of an indictment found against him by a jury composed of less than twenty-three members, but not less than sixteen. In such case, there is no deficiency in the jury, and the smaller the legal number the more secure is the defendant against indictment. (*State v. Cooley*, 502.)

3. **TRIAL—GRAND JURY—MEMBER IRREGULARLY ON PANEL.**—Mere irregularity in the proceedings by which a grand juror gets upon the panel does not affect the legality of its proceedings, if such juror is not personally disqualified. (*State v. Cooley*, 502.)

GROWING CROPS.

See Execution, 15.

GUARANTY.

GUARANTY—LIABILITY OF GUARANTOR FOR COLLECTION.—A mere guarantor of the collection of a note is liable upon his guaranty only when it is shown that such note cannot be collected of the maker. (*Central Investment Co. v. Miles*, 681.)

GUARDIAN AND WARD.

See Suretyship, 1.

HABEAS CORPUS.

See Depositions, 2.

HACK DRIVERS.

See Railroads, 3, 4, 14.

HIGHWAYS.

1. HIGHWAYS—DUTY TO MAINTAIN.—The duty imposed upon towns to construct and maintain highways is a governmental duty, for a violation of which no action lies by a private individual, unless authorized by statute. (*Bartram v. Sharon*, 225.)

2. HIGHWAYS—DEFECTS IN—ACTION FOR INJURIES BY. A STATUTE, providing that any person injured by means of a defective road or bridge may recover damages therefor, is penal in its nature, and must be strictly construed. (*Bartram v. Sharon*, 225.)

3. HIGHWAYS—LIABILITY OF TOWNS.—If there are two efficient, independent proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received through such defect, and the town is not liable therefor. (*Bartram v. Sharon*, 225.)

4. HIGHWAYS—INJURY BY DEFECT IN—STATUTORY CONSTRUCTION.—A traveler on a highway cannot be injured through a defect in the highway, within the meaning of a statute giving a right of action against a town for an injury caused by a defective road or bridge, when the culpable negligence of a fellow traveler is a proximate cause of his injury. (*Bartram v. Sharon*, 225.)

5. HIGHWAYS—DEFECTS IN—INJURY CAUSED BY.—An injury caused by the culpable negligence of a traveler, whether to himself or to another, does not happen by means of or through a defect in the highway, even if such defect were a concurring cause. (*Bartram v. Sharon*, 225.)

See Municipal Corporations, 4-11; Railroads, 11, 12.

HOMESTEAD.

1. HOMESTEADS—CONVEYANCE BY WIFE—TEMPORARY ABSENCE OF HUSBAND.—A husband is living with his wife, within the meaning of a statute preventing her from alone conveying her homestead when he is living with her, unless he has ceased to live with her with intent never to return. The fact that he absents himself from wife and home in an effort to better provide for the family, with intent to return as soon as circumstances will permit, does not constitute an abandonment of the wife, nor does he cease to live with her under such circumstances. (*Walton v. Walton*, 540.)

2. HOMESTEAD—HUSBAND AND WIFE—CONVEYANCE BY WIFE—ABSENCE OF HUSBAND.—A husband does not cease to live with his wife within the meaning of a statute prohibiting the wife alone from conveying her homestead if her husband is living with her, although he absents himself from wife and home in an effort to better provide for the family and his intent to return is subject to the purpose of having his wife join him if it should transpire that they can better their condition by removing from the homestead and securing another in another place. (*Walton v. Walton*, 540.)

3. PARTITION OF HOMESTEAD—ESTATE OF DECEDENT. THE CHILDREN of an intestate, though the issue of a former marriage, are, as well as the widow, entitled to the benefit of a homestead exemption in the real and personal property of the decedent. Hence, if the children are adults, a homestead in the decedent's land, as well as a homestead exemption in his personal property, may be set off to the widow and children, and be at once partitioned among them. (Ex parte Worley, 783.)

HOMICIDE.

1. HOMICIDE—JUSTIFIABLE—SELF-DEFENSE.—In cases of mutual combat the slayer is protected only when the killing is done as an absolute necessity to save his own life, and only in cases where it appears that the person killed is the assailant, or that the slayer has in good faith endeavored to decline any further struggle before he inflicts the mortal wound. (Smith v. State, 286.)

2. HOMICIDE—JUSTIFICATION—SELF-DEFENSE.—It is justifiable homicide for one to kill another who, in company with some person or persons, intends and endeavors, in a riotous and tumultuous manner, to enter his habitation for the purpose of assaulting or offering personal violence to any person therein, and it is not necessary, in order to justify such killing, that such personal violence shall amount to a felony. (Smith v. State, 286.)

3. HOMICIDE—UNJUSTIFIABLE KILLING.—A mere trespass on real property, accompanied by insulting and abusive words or gestures, is not sufficient provocation for a killing to reduce it from murder to voluntary manslaughter. (Smith v. State, 286.)

4. HOMICIDE.—INSTRUCTIONS COMMENTING UPON THE EVIDENCE of provocation influencing the defendant to commit the offense are erroneous and justify a reversal, where plainly prejudicial to defendant. (State v. Grugin, 553.)

5. HOMICIDE—INSTRUCTIONS AS TO PROVOCATION.—In a prosecution for homicide, which defendant pleads was committed under great provocation, it is error for the court to dictate to the jury, as a matter of law, what was a sufficient or reasonable provocation and what a sufficient cooling time. (State v. Grugin, 553.)

6. HOMICIDE—THEORY OF DEFENSE—INSTRUCTIONS EMBODYING.—Where the story of the defendant in homicide is not unreasonable nor stamped with improbability, although in some respects his testimony is not consistent, he is entitled to have the theory which it embodies presented to the jury with appropriate instructions. (State v. Grugin, 553.)

7. HOMICIDE—PROVOCATION REDUCING TO MANSLAUGHTER—DEFINITION.—Adequate provocation, for such a state of mind as will reduce homicide committed under its influence to manslaughter, must be anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them. (State v. Grugin, 553.)

8. HOMICIDE—SUFFICIENCY OF PROVOCATION—QUESTION FOR JURY.—Where a defendant in homicide pleads in mitigation of his offense that it was provoked by his knowledge that his daughter had been ravished by his victim, he is entitled to have submitted to the jury the question whether or not, under the evidence given, the provocation was sufficient to reduce defendant's crime to manslaughter. (State v. Grugin, 553.)

9. HOMICIDE—FELONY OF DECEASED—RIGHT OF DEFENDANT TO ARREST HIM.—One who has sexual intercourse

with a female of previous chastity and under eighteen years of age, whether with or without her consent, is, in Missouri, guilty of felony, and the father of such female, having knowledge that such felony has been committed, has the right to go to the home of the guilty man to arrest him. His right to be there for that purpose is not destroyed by the fact that, under provocation by words of such person, and in hot blood, he killed him, and the court should, in a prosecution of the parent for homicide and upon his request, so instruct the jury. (State v. Grugin, 553.)

10. **HOMICIDE—PROVOCATION ARISING FROM WORDS.**—In exception to the general rule, there are circumstances where mere words do amount to a provocation in law, that is, a reasonable provocation, to be submitted to the determination of the jury, and, if found by them to exist, may reduce homicide to the grade of manslaughter. (State v. Grugin, 553.)

11. **HOMICIDE—INSTRUCTIONS—BRUTALITY AND ATROCITY.**—Homicide done by means of a shotgun at close range is not necessarily brutal and atrocious, and the court is not justified in using the terms "brutality and atrocity" in instructing the jury. (State v. Grugin, 553.)

12. **HOMICIDE—IRRECONCILABLE INSTRUCTIONS.**—An instruction in a prosecution for homicide that under the law mere excitement and agitation do not, of themselves and alone, destroy the element of deliberation in murder in the first degree, is erroneous and is moreover not reconcilable with a preceding instruction allowing the jury to take such influences into consideration in passing upon the defendant's motives, intentions, and purposes, and the reasonableness and good faith of the same. Such instructions are well calculated to mislead the jury and, therefore, justify a reversal in favor of the defendant. (State v. Grugin, 553.)

13. **HOMICIDE—INDICTMENT.**—A MOTION TO QUASH an indictment for murder is properly denied, where it charges every fact essential to a good indictment for that crime, and is in the most approved form. (State v. Burns, 588.)

14. **HOMICIDE—INSTRUCTIONS—INFIDELITY—JEALOUSY.** In a murder case, where the defendant is charged with having killed his wife, it is proper to instruct, on behalf of the prosecution, that, if he killed her because she was unfaithful to her marriage vows, or killed her because of his jealousy, he is guilty of murder in the first degree. (State v. Burns, 588.)

15. **HOMICIDE — MURDER — SELF-DEFENSE — EXPRESS MALICE.**—A person who kills another in self-defense is not guilty of murder, though he bore express malice toward the deceased. (State v. Matthews, 594.)

16. **HOMICIDE—SELF-DEFENSE—RIGHT OF ATTACK.**—It is not generally true that the right of self-defense does not imply the right of attack. A person about to be attacked is not bound to wait until his adversary gets "the drop on him," or "draws a bead on him," before he takes steps to defend himself, but he may safely act upon appearances, and even kill his assailant, if that is necessary to avoid great bodily harm apprehended by the slayer. (State v. Matthews, 594.)

17. **HOMICIDE—KEEPING OUT OF THE WAY—SELF-DEFENSE.**—A person who expects another to attack him is not bound to keep himself out of the way of being assaulted, and, if he kills his assailant to avoid great bodily harm, he may rely upon the plea of self-defense. (State v. Matthews, 594.)

18. HOMICIDE — MANSLAUGHTER — RESISTING A TRESPASS ON PROPERTY.—A person, though on his own *terra firma*, is not justified in killing another because the latter tears down his fence or carries it off, but if the killing of the trespasser is done in a heat of passion, engendered by such acts, it is nothing more than manslaughter in the fourth degree. (*State v. Matthews*, 594.)

19. HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.—An instruction, in a murder case, that the defendant was not justified in shooting the deceased because the latter was removing the former's fence, is erroneous and misleading, because it does not go far enough. It should further state that if the killing was done in hot blood, engendered in the defendant, by the acts of the deceased, it would be only manslaughter in the fourth degree. (*State v. Matthews*, 594.)

20. HOMICIDE — MANSLAUGHTER — SELF-DEFENSE —INSTRUCTIONS.—A plea of the defendant, in a murder case, that the killing was done in self-defense does not deprive him of his right to an instruction based on the claim that the killing was manslaughter in the fourth degree. (*State v. Matthews*, 594.)

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—FRAUDULENT SALE BY HIM TO HER—AGENCY—NOTICE.—Under a statute requiring an immediate delivery and continued change of possession of personal property to make a transfer thereof valid as against the vendor's creditors, while he remains in possession, a sale of personal property by a husband to his wife is void as against his creditors, if not followed by an immediate delivery, and actual and continued change of possession, and the wife cannot avoid the legal effect of the statute by allowing her husband to remain in possession of the property as her agent, in the absence of any notice to the world of the change of conditions. (*O'Kane v. Whelan*, 42.)

2. HUSBAND AND WIFE—FRAUDULENT SALE BY HIM TO HER—SUBSEQUENT FILING OF INVENTORY BY WIFE—EFFECT OF.—If a husband makes a sale of personal property to his wife, fraudulent as against his creditors, because there is no immediate delivery, and no actual and continued change of possession, the transfer is not made valid as to his existing creditors by the fact that the wife subsequently makes, and causes to be recorded, an inventory of her separate property, as authorized by statute, and which includes the personalty which was the subject of the sale. (*O'Kane v. Whelan*, 42.)

3. HUSBAND AND WIFE—SEPARATE PROPERTY OF HUSBAND—JOINT DEED.—If a husband purchases property with his separate means, he may show that it is his separate property, and was so understood at the time of the conveyance, although the deed was taken in the name of himself and his wife. He may show that she has no estate or interest therein; that it was not intended as a gift to her, either in whole or in part; and that he permitted the conveyance to be made to them jointly, in order that the property might be better managed and cared for during his absence from home as an officer of the United States navy. (*Svetinich v. Sheean*, 50.)

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION.—Property conveyed, for a money consideration, to either or both of the spouses, before the amendment of section 164 of the Civil Code of California, in March, 1889, was, there being no proof to the contrary, deemed to be community property. (*Svetinich v. Sheean*, 50.)

5. HUSBAND AND WIFE—HUSBAND, WHEN LIVING WITH WIFE, THOUGH ABSENT.—In legal contemplation, the husband is living with the wife, though driven by stress of circumstances and pecuniary difficulties to absent himself from home and wife in an effort to better provide for his family, and he ceases to live with his wife only when, with intention to never return, he deserts or abandons her. (*Walton v. Walton*, 540.)

See *Fraudulent Conveyances*, 5; *Homestead*, 1, 2.

INDICTMENT.

See *Arson*, 1; *Criminal Law*, 2; *Forgery*, 2; *Grand Jury*, 1; *Homicide*, 13.

INFANTS.

See *Negligence*, 4-6.

INFORMATION.

See *Forgery*, 3.

INHERITANCES.

See *Taxation*, 5-7.

INJUNCTION.

1. INJUNCTION AGAINST ANNOYING CONDUCT OF DISCHARGED EMPLOYÉ, WHO ASSUMES TO ACT AS PARTNER—INSOLVENCY.—A person who is merely employed as a salesman in a business, upon a salary, with a right to a share of the net profits, if any, but who is discharged for neglect of duty, and who, claiming to be a partner of his employer, with a partner's rights, afterward persists in annoying conduct, such as intruding upon the business premises, interfering with the owner's affairs, assuming control over the business, and intercepting money due to the owner, may be enjoined from continuing such conduct, especially where he is admittedly insolvent, as there is no adequate remedy at law. (*De Groot v. Peters*, 91.)

2. INJUNCTION TO PREVENT TRESPASS.—Injunction is an appropriate remedy to prevent continued trespasses upon land in the use of which the public interest is involved, where the damage is great, and the defendant has not sufficient property to respond in an action at law. (*New York etc. R. R. Co. v. Scovill*, 159.)

See *Associations*, 4; *Cotenancy*, 4; *Pleading*, 2, 3.

INSANE PERSONS.

See *Contracts*, 10-13.

INSOLVENCY.

See *Banks and Banking*, 4-7; *Corporations*, 1, 2, 6-15, 18, 19; *Injunction*, 1; *Insurance*, 3.

INSTRUCTIONS.

1. ASSAULT — ERRONEOUS INSTRUCTION — DEADLY WEAPON.—An instruction which informs the jury that a person assaulted by another, who has no weapon in his hands, or the appearance thereof, is not justified in using a deadly weapon in defense of his person, is erroneous. (*Davis v. State*, 322.)

2. INSTRUCTIONS—PRINCIPLES GOVERNING.—An instruction must not only state correct legal principles, but so state them that the jury may be enabled to apply them to the evidence. (*Davis v. State*, 322.)

3. INSTRUCTIONS—WHEN ERRONEOUS.—An instruction is erroneous, although correct as an abstract proposition of law, if it leaves the jury in doubt or uncertainty as to how it should be applied to the evidence. (*Davis v. State*, 322.)

4. INSTRUCTIONS.—IF A SPECIAL VERDICT IS REQUESTED, no instructions are proper, except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, and who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein. It is not necessary or proper to give general instructions as to the law of the case. (*Udell v. Citizens' St. R. R. Co.*, 336.)

5. INSTRUCTIONS—PRESUMPTION AS TO, ON APPEAL.—Upon an appeal every reasonable presumption is indulged in favor of the action of the trial court and this presumption extends to the giving of instructions as well as to any other of the proceedings. (*Hamilton v. Love*, 384.)

6. INSTRUCTIONS—APPEAL—REVERSAL.—A cause will not be reversed on appeal, though the whole of the law upon a particular head is not fully stated in one or more of the separate parts of the charge to the jury, if the instructions to them, taken as a whole, correctly state the law. (*Hamilton v. Love*, 384.)

7. INSTRUCTIONS—CONSIDERATION OF, AS A WHOLE.—Instruction should be construed with reference to each other. The entire charge should be taken as a whole, and not in detached parts. (*Hamilton v. Love*, 384.)

8. INSTRUCTIONS—FACTS ADMITTED IN OPENING STATEMENTS.—Instructions may be shaped in accordance with facts conceded or admitted by counsel in their opening statements. (*Pratt v. Conway*, 602.)

See *Damages*, 17; *Forgery*, 4; *Homicide*, 4-6, 11, 12, 14, 19; *Negligence*, 2; *New Trial*, 1, 4.

INSURANCE.

1. INSURANCE—LIFE—RIGHT OF ASSIGNEE TO SUE.—One who holds the entire legal title to a life insurance policy by assignment, as well as a beneficial interest therein as legatee, and also an absolute interest in the proceeds of the policy to the extent of premiums paid by him for other beneficiaries, may maintain an action thereon in his own name, and the insurance company cannot defend on the ground that the plaintiff does not own the entire beneficial interest. (*McElroy v. Hancock etc. Ins. Co.*, 400.)

2. INSURANCE—LIFE—TIME OF FURNISHING PROOF OF DEATH.—A provision in a life insurance policy, that "notice of the claim and proof of death shall be submitted to the company within ninety days after the decease," does not defeat the claim of the beneficiary, when he does not know of the existence of the policy or of the death of the insured until more than a year thereafter, and he notifies the company at once after acquiring such knowledge. (*McElroy v. Hancock etc. Ins. Co.*, 400.)

3. INSURANCE—LIFE—RIGHT OF TRUSTEE IN INSOLVENCY TO SUE.—The trustee of an insolvent assignee of a life insurance policy may maintain an action thereon when the insolvent

holds the legal title and an equitable interest in the policy. (*McElroy v. Hancock etc. Ins. Co.*, 400.)

4. **INSURANCE—LIFE—WAIVER OF PROOF OF DEATH.**—Failure to furnish proof of death within the time limited by a life insurance policy is waived, when the company makes a proposal to settle, or absolutely refuses to pay, or denies all liability, or asks for additional proof without making objection that the proof given was not furnished in time. (*McElroy v. Hancock etc. Ins. Co.*, 400.)

5. **INSURANCE — LIFE — TEMPORARY INSURANCE—NON-FORFEITABLE PAID-UP POLICY—APPLICATION OF STATUTES—LIABILITY—WAIVER.**—The provisions of the Missouri statute which concern temporary insurance and the amount thereof, as well as the length of time that it shall, in each case, continue; which make policies of insurance nonforfeitable after the payment of two or more full annual premiums thereon; and which declare that, in case of the death of the insured within the term of temporary insurance, to be ascertained as provided by the statute, the company shall be answerable for the full amount of the policy, less the unpaid premiums with interest thereon, apply to a case in which an insurance company has issued its fifteen year endowment policy, where four annual premiums have been paid; where default is made when the next annual payment becomes due in May, and the insured dies in the following November; and where the policy provides, in case of nonpayment of premiums, for the issuance, upon demand, of a nonforfeitable paid-up policy after the original policy has been in force for three years; but those provisions of the statute concerning the paid-up policy are inapplicable where the insured declines his right to it, and makes no demand therefor. Statutory provisions of exemption from the control of certain statutes are also inapplicable where there is nothing to bring the policy within the exempted matters. Hence, if the insured dies, as in this case he did, within the term of temporary insurance, thus fixed or ascertained by the statute, the amount of the policy, less such unpaid premiums and interest, must be paid, notwithstanding any waiver in the policy by the insured of his statutory rights. (*Cravens v. New York Life Ins. Co.*, 628.)

6. **INSURANCE—LIFE—PLACE OF CONTRACT.**—If a contract of insurance is delivered in one state, and the premiums are there paid, upon performance of the conditions precedent that the premiums shall be paid, and that the policy shall be delivered to the insured during his life and good health, the contract is executed in that state, although the insurance company is incorporated under the laws of another state, and has its chief office there; and this is true, although it is expressly agreed in the application and policy that the place of the contract is in such other state, and that the contract shall be construed according to the laws thereof. (*Cravens v. New York Life Ins. Co.*, 628.)

7. **INSURANCE COMPANIES — FOREIGN — LIMITATIONS UPON TRANSACTION OF BUSINESS.**—Foreign insurance companies which do business in this state do so not by right but by grace, and must, in doing so, conform to its laws. The state may also prescribe conditions upon which it will permit such companies to transact business within its borders, or exclude them altogether, without violating any of their contractual rights. (*Cravens v. New York Life Ins. Co.*, 628.)

8. **INSURANCE—CONTRACTS WITH FOREIGN COMPANIES—WHAT LAW CONTROLS.**—When no statute intervenes prohibiting it, an insurance company doing business, by permission, in

another state from that of its incorporation may, by contract, make the law of the state of its incorporation the applicatory law of the contract, but where the laws of the state in which it does business, by license, prohibits such a corporation from making certain kinds of contracts, it is bound by such laws and must conform to them. (*Cravens v. New York Life Ins. Co.*, 628.)

9. **INSURANCE—LIFE—DEMAND FOR PAID-UP POLICY—CONDITION PRECEDENT—WAIVER.**—If a policy of life insurance requires a demand to be made for a paid-up policy within six months after default in the payment of premium, such demand, with a surrender of his policy, is a condition precedent to the holder's right to a paid-up policy, and it cannot be waived by the company so as to affect the rights of the insured. (*Cravens v. New York Life Ins. Co.*, 628.)

10. **INSURANCE COMPANIES—FOREIGN—STATUTES CONCERNING—CONSTITUTIONALITY.**—State laws regulating foreign insurance companies, and prescribing rules by which they may do business within a state, or prohibiting them from doing so altogether, do not contravene any provision of either the state or federal constitution. (*Cravens v. New York Life Ins. Co.*, 628.)

11. **INSURANCE—STATUTES AS PART OF CONTRACT OF.**—If a contract of insurance is executed in this state, the statute in force respecting its subject matter becomes as much a part of the contract as if copied therein. (*Cravens v. New York Life Ins. Co.*, 628.)

12. **INSURANCE—CONTRACT OF—WAIVER OF STATUTORY PROVISIONS.**—The parties to a contract of insurance cannot, either directly or indirectly, waive the provisions of the statute governing it. (*Cravens v. New York Life Ins. Co.*, 628.)

13. **INSURANCE—CONTRACT OF—LAW GOVERNING, AS TO PLACE.**—A contract of insurance, executed in this state, is subject to the laws of this state, notwithstanding any stipulations therein to the contrary. (*Cravens v. New York Life Ins. Co.*, 628.)

14. **INSURANCE—PROVISIONS IN REGARD TO ARBITRATION.**—NOTICE to the insured to protect the property from further damage after the loss, and to preserve all that remains thereof until the loss has been determined in the manner stipulated for in the policy, and that the insurer would not pay any amount claimed until sixty days after the amount of loss or damage has been determined in the manner stipulated in such policy, does not constitute a demand for submission to appraisers for the ascertainment of the amount of the loss as provided for in the policy. (*Grand Rapids Fire Ins. Co. v. Finn*, 736.)

15. **INSURANCE—PROVISIONS AS TO ARBITRATION.**—Provisions in a policy of fire insurance that, in case of disagreement as to the amount of loss, it shall be ascertained by appraisers, and shall not become payable until sixty days after notice and satisfactory proof of loss have been given, including an award by appraisers, when an appraisal has been required, and that no action shall be sustainable on the policy until full compliance with all such conditions, do not make either an ascertainment of the loss by appraisers, or a demand by the insured therefor, a condition precedent to a right of action on the policy, nor do they impose any obligation on the insured to furnish an award of appraisers, except when demanded by the insurer. (*Grand Rapids Fire Ins. Co. v. Finn*, 736.)

16. **INSURANCE—ARBITRATION—CONDITION PRECEDENT.**—A condition in a policy of fire insurance, providing for an

arbitration in case the parties cannot agree as to the amount of loss, cannot operate to deprive the assured of his right of action, unless clearly made a condition precedent to the existence of such right. (*Grand Rapids Fire Ins. Co. v. Finn*, 736.)

17. **INSURANCE—PROVISIONS IN REGARD TO ARBITRATION.**—Under provisions in a policy of fire insurance that, in case of disagreement as to the amount of loss, it shall be ascertained by appraisers, the demand of the insurer for an appraisal must be made in good faith, within a reasonable time after proof of the loss has been furnished, and in such direct and explicit terms that a person of ordinary intelligence would fairly understand and be informed that the insurer requests a submission to appraisers for the ascertainment of the loss, and when it is claimed that the demand was made in writing, the instrument, if ambiguous, must be construed most strongly against the insurer. (*Grand Rapids Fire Ins. Co. v. Finn*, 736.)

18. **INSURANCE, LIFE—DEATH FROM ABORTION.**—Under a life insurance policy providing that it shall be void if the insured dies in consequence of any violation of, or attempt to violate, any criminal law of the United States, or of any state where the insured may be, no recovery can be had if death results from the insured having voluntarily submitted to an illegal operation known to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. To permit a recovery in such case is against public policy. (*Wells v. New England Mut. Life Ins. Co.*, 763.)

19. **INSURANCE.—STATUTES MERELY REGULATING** the methods of conducting the business of insurance, foreign and domestic, are but the exercise of the police power of the state in the interests of the public, and are valid and constitutional. (*Swing v. Munson*, 772.)

20. **INSURANCE — FOREIGN POLICY — NONCOMPLIANCE WITH STATUTES.**—A contract of insurance made with a foreign insurance company, though valid where made, cannot be enforced in another state where the insured property is located, when the insurance company has never complied with the conditions of the statute of the latter state essential to the making of a valid contract of insurance therein. (*Swing v. Munson*, 772.)

21. **INSURANCE — FOREIGN POLICY — NONCOMPLIANCE WITH STATUTES.**—A contract of insurance made with a foreign insurance company, and valid where made, cannot be enforced in another state, when in conflict with its statutes and the declared policy of its laws. (*Swing v. Munson*, 772.)

INTERSTATE COMMERCE.

INTERSTATE COMMERCE—TELEGRAPH COMPANIES. A state statute restricting contracts limiting the time in which suit may be brought, or providing for notice before suit is brought on contracts for the sending and delivery of telegraph messages, is not unconstitutional as an unlawful interference with interstate commerce, when applied to contracts for the transmission of interstate messages. (*Burgess v. Western Union Tel. Co.*, 833.)

JUDGES.

1. **JUDGES—EXEMPTION FROM LIABILITY.**—Judges of inferior courts, as well as judges of courts of superior and general jurisdiction, are exempt from liability in damages for judicial acts, even when such acts are in excess of their jurisdiction. (*Calhoun v. Little*, 254.)

2. **JUDGES—EXEMPTION FROM LIABILITY.**—A judge of an inferior court which has jurisdiction of the person and jurisdiction to try and punish the accused for the offense with which he is charged is not liable in damages for exceeding his authority in fixing and inflicting punishment under an ordinance subsequently declared void. (*Calhoun v. Little*, 254.)

JUDGMENT.

1. **JUDGMENT LIEN—CONTINUANCE OF, AFTER DEATH OF JUDGMENT DEBTOR.**—A judgment docketed against the judgment debtor during his lifetime does not cease to be a lien upon his death, but continues to be a lien for the period prescribed by statute as the lifetime of judgment liens. (*Morton v. Adams*, 53.)

2. **JUDGMENT LIEN—CLAIM AGAINST ESTATE—INCONSISTENCY.**—It is not inconsistent with the continuance of a judgment lien, after the death of the judgment debtor, that the judgment must, as required by law, be presented as a claim against the estate of the judgment debtor, to be paid in the due course of administration, and that it is not enforceable by execution. (*Morton v. Adams*, 53.)

3. **JUDGMENT LIEN—CLAIM AGAINST ESTATE—DESTRUCTION OF LIEN—MERGER.**—The presentation and allowance of a judgment as a claim against the estate of the judgment debtor does not destroy the lien of the judgment by merger in the allowance of the claim, or otherwise. (*Morton v. Adams*, 53.)

4. **JUDGMENT—CLAIM AGAINST ESTATE—MERGER.**—The allowance of a claim against an estate is not, in any true sense, a judgment; and none of the grounds upon which one judgment has been held to be merged in another apply to the allowance of a judgment as a claim against an estate. (*Morton v. Adams*, 53.)

5. **JUDGMENT—PERSONAL—CLAIM AGAINST RECEIVER.** A judgment recovered by default in New York, where the only service of process upon the defendant was made out of that state, cannot found a claim against the estate in the hands of the receiver. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

6. **JUDGMENT—ASSIGNMENT.**—The assignee of a judgment, which is vacated on appeal, takes no interest under the assignment. (*Bennet v. Lathrop*, 222.)

7. **JUDGMENTS—RES JUDICATA.**—A judgment by default in favor of a physician for professional services is not a bar to an action against him for malpractice in the performance of such services. (*Jordahl v. Berry*, 469.)

8. **JUDGMENTS—COLLATERAL ATTACK.**—A judgment of a court having jurisdiction of the parties, and of the subject matter, cannot be impeached collaterally. (*Hall v. Sauntry*, 497.)

9. **JUDGMENTS AGAINST RECORD OWNER—EFFECT AGAINST GRANTEE UNDER UNRECORDED DEED.**—A statute providing that "every conveyance of real estate not so recorded shall be void as against any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record prior to the recording of such conveyance," is not limited in its application to money judgments in favor of creditors, but applies to any judgment affecting the title to real estate, where such title appears of record in the name of the person against whom the judgment is rendered. (*Hall v. Sauntry*, 497.)

10. **JUDGMENT—DEBT—MERGER OF CAUSE OF ACTION.** When a debt is sued for, a final judgment merges the cause of ac-

tion into the judgment, from its date. The old debt ceases to exist and the new, or judgment debt, takes its place. (*Tourville v. Wabash R. R. Co.*, 650.)

11. JUDGMENT, FINAL—REMANDING CAUSE, WITH DIRECTIONS.—When an appellate court remands a cause, with directions "to enter judgment for the plaintiff" in a certain amount, the judgment of the appellate court is a final judgment in the cause, and the entry of that judgment in the lower court is a purely ministerial act. (*Tourville v. Wabash R. R. Co.*, 650.)

12. JUDGMENTS AS EVIDENCE.—In the absence of fraud and collusion, a judgment is conclusive evidence, even against a stranger, of the relation of debtor and creditor between the parties thereto, and of the amount of the indebtedness. (*Bolla v. Metcalf*, 898.)

13. JUDGMENTS AGAINST COUNTIES ARE CONCLUSIVE, as against collateral attack, upon the question of the validity of county debts upon which they are founded, both as concerns the county and a citizen or taxpayer thereof. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

14. JUDGMENTS BY CONFESSION.—A board of county commissioners cannot confess judgment against the county, nor authorize an attorney so to do, without pleadings and a hearing on their behalf. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

See Appeal, 12; Attachment, 5, 6; Attorney and Client; Courts; Ejectment; Execution, 1; Municipal Corporations, 15, 16.

JUDICIAL SALES.

1. JUDICIAL SALES—CAVEAT EMPTOR.—A purchaser at a judicial sale is bound to comply with his bid, even though he gets no title to the property offered for sale. (*Pinkston v. Harrell*, 242.)

2. JUDICIAL SALES, EFFECT OF—CAVEAT EMPTOR.—A purchaser at a judicial sale must comply with his bid, whether the property offered for sale belongs to the defendant in execution or not, and if the sale is regular and the amount bid equals or exceeds the amount due on the execution, it satisfies the judgment and the plaintiff in execution is precluded by an entry of sale by the sheriff on the execution from showing that there has been, in fact, no sale. (*Pinkston v. Harrell*, 242.)

3. JUDICIAL SALES—COMPELLING COMPLIANCE WITH BID.—A purchaser at a judicial sale is bound to comply with his bid, and, upon his refusal, the sheriff may, by proper proceeding by the defendant in execution, be compelled to enter the amount of such bid as a credit upon the execution. (*Pinkston v. Harrell*, 242.)

4. JUDICIAL SALES—TITLE OF PURCHASER—LAND NOT OWNED BY JUDGMENT CREDITOR.—Where two people enter into a verbal agreement that one of them will furnish the purchase price of certain land, and that the other will attend to the purchase of the land in consideration of receiving one-half of the profits which may later accrue from a resale of the land, and the land is so purchased, the second party taking a deed in his own name, and later, by two separate conveyances, transferring to the first party first one and then the other undivided half of the land, the second party at no time has an interest in the land subject to seizure and sale under execution. A sale of an undivided half of the land, under a judgment rendered against the second party subsequent to his conveyance of the second undivided half, and decreed in disregard of such conveyance, passes nothing to a purchaser thereat. (*Perkins v. Meighan*, 586.)

5. JUDICIAL SALES—PURCHASE BY ATTORNEY.—A purchase of property by an attorney at a judicial sale in which his client is interested is against public policy, and the client may elect to treat him as a trustee; but if the client afterward deals with the attorney as the owner of the property he thereby ratifies the purchase and is estopped from claiming the benefit thereof. (*Olson v. Lamb*, 670.)

6. JUDICIAL SALES—PURCHASE BY ATTORNEY—RATIFICATION.—If an attorney, who has purchased property at a judicial sale in which his client is interested, conceals from such client material facts which might affect the latter's election to treat the attorney as a trustee, dealings between them on the basis of the attorney's ownership, the client being in ignorance of the facts, does not prevent him, upon learning of such facts, from enforcing the trust. (*Olson v. Lamb*, 670.)

7. JUDICIAL SALES—CONTRACT AS TO BIDS.—A contract between two persons, whereby one of them is to bid at a judicial sale and subsequently handle the property on behalf of both, is valid, and does not vitiate the sale, when the effect is not to chill bids nor prevent competition, but to enable persons to compete, when without combining they cannot do so. (*Olson v. Lamb*, 670.)

8. JUDICIAL SALES—PURCHASE BY ATTORNEY—REIMBURSEMENT.—An attorney who purchases property at judicial sale in which his client is interested is entitled to recover only the amount he paid at such sale. (*Olson v. Lamb*, 670.)

9. JUDICIAL SALES—PURCHASE BY ATTORNEY—TRUSTS—COMPENSATION.—An attorney who purchases property for his own benefit at a judicial sale in which his client is interested cannot, on a suit to declare him a trustee, be allowed compensation for professional services in procuring the sale to be confirmed. (*Olson v. Lamb*, 670.)

See Execution, 13, 16, 17; Liens, 2, 4; Taxation, 1; Trusts, 1-4, 8-11.

JURISDICTION.

JURISDICTION—QUESTION OF TITLE IN FORECLOSURE PROCEEDINGS—CONTINGENT REMAINDERMAN—LIFE TENANT.—In a foreclosure suit, brought by the mortgagee of a contingent remainderman, the court has jurisdiction to determine the question of title, where the life tenant, by his answer, asserts absolute title in himself, and denies that either the mortgagee or his mortgagor has any interest in the mortgaged premises. (*People's Loan etc. Bank v. Garlington*, 800.)

See Appeal, 15; Associations, 5, 6; Attachment, 1.

JURY TRIAL.

See Homicide, 8; Master and Servant, 5, 6; Negligence, 5, 6; New Trial, 2, 3; Statutes, 16; Trial, 2, 6.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—PAROL PROMISE TO PAY RENT—ESTOPPEL.—A parol promise by one in possession of land to pay rent to one out of possession, who has neither title nor right of possession, is void for want of consideration, and is not an estoppel in favor of a landlord as against a tenant. (*Clary v. O'Shea*, 465.)

2. LANDLORD AND TENANT—ADVERSE POSSESSION.—A tenant who remains in possession after the expiration of his term,

without any express repudiation of the relation created by the lease, does not hold adversely to the landlord, no matter what his secret intention may be. (*Carson v. Broady*, 691.)

3. **LANDLORD AND TENANT—DENIAL OF TITLE BY TENANT.**—A tenant cannot, while in possession of the premises, deny his landlord's title, even before the lease is made, and this rule is applicable in every case in which such possession has been obtained by permission of the owner and in recognition of his title. (*Carson v. Broady*, 691.)

4. **LANDLORD AND TENANT—PAROL AGREEMENT FOR LEASE—STATUTE OF FRAUDS.**—A parol agreement for a lease to begin at a future date to a person already in possession as a tenant, is within the statute of frauds. (*Gladwell v. Holcomb*, 724.)

5. **LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—ELECTION OF LANDLORD—NOTICE TO QUIT.**—If a tenant for a year holds over after the expiration of his term, the landlord may elect to treat him as a tenant for another year, or as a trespasser, and, in the latter case, may maintain ejectment against him without notice of his intention not to prolong the tenancy or he may maintain an action of forcible detainer, without notice to the tenant to quit the premises, except the statutory written notice of three days required by statute. (*Gladwell v. Holcomb*, 724.)

6. **LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—HOLDING OVER.**—A tenant for a year holding over with the assent of his landlord after the expiration of the lease becomes a tenant from year to year, upon the terms, and subject to the conditions, of the original lease. (*Gladwell v. Holcomb*, 724.)

7. **LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—NOTICE TO QUIT** is not necessary to terminate a tenancy from year to year arising from the tenant holding over after the expiration of his term. (*Gladwell v. Holcomb*, 724.)

LEASE.

See Cotenancy, 6.

LEGISLATURE.

See Contracts, 18.

LIBEL.

LIBEL—TRANSMISSION BY TELEGRAPH—PUBLICATION.—If a libelous telegraphic message is delivered to an operator at one place, and by him transmitted by sound over the wires to the operator at another place, and by the latter reduced to writing and delivered to the addressee, this constitutes a publication of the libel. (*Peterson v. Western Union Tel. Co.*, 461.)

LIENS.

1. **LIENS—RIGHTS OF JUNIOR LIENOR—VOLUNTARY PAYMENT.**—The discharge by a lienholder of a valid prior tax, or other valid lien, is not a voluntary payment, but a payment in invitum. (*New England Loan etc. Co. v. Robinson*, 657.)

2. **LIENS—RELEASE OF—EXECUTION SALES—NOTICE.**—If a release of a lien is filed of record, and on the same day the debtor files a refusal to accept such release, both appearing on the same docket, purchasers at execution sale are bound to take notice of such refusal. (*Fisler v. Laubach*, 769.)

3. LIENS—RELEASE OF.—The holder of a first lien cannot release land of his debtor, taken in execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, against the latter's will. (*Fisler v. Laubach*, 769.)

4. LIENS — ORDER OF DISCHARGE OF — EXECUTION SALES.—In the absence of any equity to prevent him, a debtor has the absolute right to insist on the regular process of the law with its regular and usual result for the discharge of liens on his property, and their payment out of the proceeds according to their legal priority. (*Fisler v. Laubach*, 769.)

5. LIENS — PRIORITIES — FORECLOSURE—PARTIES—RE-IMBURSEMENT.—The holder of a junior lien on a tract of land, not made a party to the foreclosure of a prior lien upon a larger tract, including the former, cannot enforce his lien against the purchaser at the foreclosure sale without first compensating him to the extent that he has discharged such prior lien. (*Spencer v. Jones*, 870.)

See Cotenancy, 1-4; Judgment, 1-3; Mechanics' Liens; Mortgages, 4; Pledge, 3; Receivers, 5, 7; Shipping, 1; Taxation, 2-4.

LIMITATION OF ACTIONS.

LIMITATION OF ACTIONS—DEMURRER.—The statute of limitations may be invoked by general demurrer when the lapse of time appears on the face of the petition. (*Zuellig v. Hemerlie*, 707.)

See Suretyship, 6; Taxation, 2-4; Vendor and Purchaser, 3.

MANSLAUGHTER.

See Homicide, 19, 20.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—DECREE FOR MAINTENANCE—RECEIVER.—If a wife sues her husband for a divorce on the ground of his extreme cruelty, praying that a portion of what she claims to be the community property be awarded to her, that a receiver be appointed, and for general relief, but the divorce is denied, she is entitled to a decree for the maintenance of herself, and the children under her care, and for the appointment of a receiver to enforce such decree, where the statute authorizes such a decree in case the divorce is denied, if the case, made by her shows that her husband has left her without cause; that he has been guilty of conduct which the court finds makes it impossible for her to live with him; that she has no means; that he is a nonresident of the state; that he owns property of great value, both in the state and out of it; and that he has endeavored, and is endeavoring, to dispose of his property for the purpose of depriving her of the means of support. It is not necessary, in such a case, to charge a failure to provide the plaintiff with the necessities of life. (*Anderson v. Anderson*, 17.)

2. MARRIAGE AND DIVORCE—NECESSITY FOR MAINTENANCE UPON REFUSAL OF DIVORCE.—Upon the refusal of a divorce asked for by a wife, the necessity of a separate maintenance for her, and the children under her care, is shown by an undenied averment in her complaint that her husband was threatening to dispose of his property in order to deprive her of the means of support. (*Anderson v. Anderson*, 17.)

3. MARRIAGE AND DIVORCE—MAINTENANCE UPON REFUSAL OF DIVORCE—SUPPORT OF MINOR CHILD.—Upon the

denial of a wife's application for a divorce, the court, in granting a decree for the maintenance of the plaintiff, may properly make an allowance to her for the support of a minor child, who is in the mother's custody and is supported by her, although the custody of the child has not been awarded to the plaintiff. The husband has no reason to complain, for such a provision relieves him from liability for the support. (*Anderson v. Anderson*, 17.)

4. MARRIAGE AND DIVORCE—MAINTENANCE UPON REFUSAL OF DIVORCE—SUPPORT OF INVALID ADULT DAUGHTER.—Upon the denial of a wife's application for a divorce, the court, in granting a decree for her maintenance, may properly make an allowance to her for the support of an invalid daughter under her care, who is past eighteen years of age, and who is dependent upon her parents for support. (*Anderson v. Anderson*, 17.)

5. MARRIAGE AND DIVORCE—MAINTENANCE UPON DENIAL OF DIVORCE—WHAT MAY BE CONSIDERED.—In fixing the amount of maintenance, upon a refusal of the wife's application for a divorce, her condition in life may always be considered. (*Anderson v. Anderson*, 17.)

6. MARRIAGE AND DIVORCE—ALLOWANCE FOR MAINTENANCE UPON DENIAL OF DIVORCE—WHEN NOT EXCESSIVE—DISCRETION.—There is no settled rule to control the discretion of the trial court in making an allowance to the wife for her maintenance upon a denial of her application for a divorce. An allowance to her, however, of one hundred and fifty dollars per month, out of an income of two hundred and thirty dollars, from property in this state, beside the privilege of a dwelling-house and furniture, is not excessive, where the husband has an income, from property in another state, of four hundred and forty dollars per month. (*Anderson v. Anderson*, 17.)

7. MARRIAGE AND DIVORCE—MAINTENANCE—FINDING AS TO PROPERTY OUT OF THE STATE.—Upon denying a wife's application for a divorce, and in making an allowance for maintenance, the court's omission to find as to the expenses of property owned by the husband in another state, as to an alleged indebtedness thereon, and as to whether its income was gross or net, is not material, where the answer admits a valuation with a gross income of two hundred and eighty-seven dollars per month, and its averments as to expenses are too vague to be the subject of a finding. (*Anderson v. Anderson*, 17.)

8. MARRIAGE AND DIVORCE—APPOINTMENT OF RECEIVER IN ACTION FOR DIVORCE—WHEN JUSTIFIABLE.—In an action by a wife against her husband for a divorce, where it appears that he is a resident of another state, to which he is attached by large holdings of property therein, and that, by reason of his nonresidence, he cannot give personal attention to his property in this state, but leaves it to the management of agents, and it is admitted by the pleadings that he has endeavored, and is endeavoring, to sell or encumber his property so as to deprive his wife of a support, the court is justified in appointing a receiver to enforce its decree of maintenance. (*Anderson v. Anderson*, 17.)

9. MARRIAGE AND DIVORCE—MAINTENANCE—MODIFYING DECREE FOR, ON APPEAL.—If a decree for maintenance contains no provision for its modification or change, the court will, upon an appeal from the judgment, be required to modify it by providing therein that, upon application of either party, upon notice to the other, and upon the proper showing therefor, it may modify or change the judgment in such mode and to such extent as it may deem just, or may set the judgment aside. (*Anderson v. Anderson*, 17.)

10. MARRIAGE AND DIVORCE—ALLOWANCE OF ALIMONY AND SUIT MONEY, WHERE MARRIAGE IS DENIED—REVERSAL OF ORDER.—As the fact of marriage must be proved by a preponderance of evidence, in an action for divorce, where the marriage is denied, an order made in such action, brought by a woman who claims to be a wife, against her alleged husband, who makes a complete denial of the marriage, allowing alimony and suit money upon a mere *prima facie* showing of the fact of marriage, made out by the averments of the complaint, depositions, and *ex parte* affidavits, will be reversed on appeal, where it is evident that the preponderance of the entire proof presented by both parties is against the fact of marriage, on the ground that the quantum of evidence necessary was not produced by the wife to support the fact of marriage, and that, if the trial court adjudged that there was a preponderance of evidence to support such fact, it was a plain abuse of discretion. (*Hite v. Hite*, 82.)

11. MARRIAGE AND DIVORCE—ALIMONY AND SUIT MONEY WHERE MARRIAGE IS DENIED.—If a woman, who claims to be a wife, brings an action for a divorce against her alleged husband, asking for alimony, *pendente lite*, counsel fees, and expenses of suit, she is not entitled to such an allowance, where the defendant denies the marriage, until she satisfies the court, by a preponderance of the entire evidence introduced upon the hearing of her motion, that she is the wife of the defendant. It is not enough for her to make merely a *prima facie* case as to the existence of the marriage, regardless of the denials or proof produced by the defendant. (*Hite v. Hite*, 82.)

12. MARRIAGE AND DIVORCE—ALIMONY.—WHEN THE MARRIAGE IS DENIED, in an action for divorce, the marriage must be proved, before alimony can be allowed; and a *prima facie* showing made by the wife, when there is a counter showing, is not sufficient, for the judge should be satisfied, from the entire proof made, of the fact of marriage. (*Hite v. Hite*, 82.)

13. MARRIAGE AND DIVORCE.—TO JUSTIFY ALIMONY, in an action for divorce, the marriage must be admitted or proved. (*Hite v. Hite*, 82.)

MASTER AND SERVANT.

1. MASTER AND SERVANT—ASSUMPTION OF RISKS.—While a servant impliedly assumes the risk of negligence by his fellow-servants, yet he does not assume any risk on account of the negligence of his master which is unknown to him; and where the negligence of the latter in retaining an incompetent or careless servant combines with the negligence of such servant, and the two contribute to the injury of another servant, the master is liable. (*Jenson v. Great Northern Ry. Co.*, 475.)

2. MASTER AND SERVANT—ASSUMPTION OF RISKS—NEGLIGENCE.—The rule that a servant impliedly assumes the risk of negligence by his fellow-servants has no application to a case where the master is negligent in employing or retaining in his service an incompetent or careless servant, who by his negligence injures another servant, having no notice of such incompetency or carelessness. In such case, the master is liable for the act of the servant whom he negligently retains. (*Jenson v. Great Northern Ry. Co.*, 475.)

3. MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF COMPLAINT.—In an action to recover for personal injury caused by negligence, a complaint to the effect that the plaintiff was

injured while in the service of the defendant, by his incompetent and careless fellow-servant, whom the defendant then knew to be such, but the plaintiff did not, carelessly and negligently causing an ax to fall upon him while each was in the line of his employment, states a cause of action. (*Jenson v. Great Northern Ry. Co.*, 475.)

4. MASTER AND SERVANT—MASTER'S LIABILITY FOR MALICIOUS ACTS OF SERVANT.—A master is liable for willful or malicious, as well as for negligent, acts of his servant, done in the course of his employment and within the scope of his authority. (*Nelson Business College Co. v. Lloyd*, 729.)

5. MASTER AND SERVANT—MOTIVE FOR ACT OF SERVANT, WHEN QUESTION FOR JURY.—If, in an action seeking to hold a master liable for the wrongful act of his servant, performed in the course of his employment, the evidence is such that different minds may fairly draw different conclusions as to the real motive and purpose of the servant in committing such act, the question of such motive must be determined by the jury under proper instructions, and it is error, in such case, for the trial court to direct a verdict for the defendant. (*Nelson Business College Co. v. Lloyd*, 729.)

6. MASTER AND SERVANT—SERVANT, WHEN IN COURSE OF EMPLOYMENT—QUESTION FOR JURY.—In an action seeking to hold the master liable for an act of his servant, which, from its nature, is within his employment, the question is whether it was in fact done in the performance of his service to his master, or was done wholly for the purpose of injuring the plaintiff, and none other, that question must be determined by the jury. (*Nelson Business College Co. v. Lloyd*, 729.)

7. MASTER AND SERVANT—ACTS BEYOND SCOPE OF EMPLOYMENT.—If a railroad company intrusts the care of its handcar to its section foreman, it does not thereby become liable for an injury to a person at a public crossing, caused by collision with such handcar through the negligence of such foreman while operating the car upon his private business, not in the line of the operation of the railroad, nor in the performance of a duty to the company, and in violation of its orders. (*Branch v. International etc. Ry. Co.*, 844.)

8. MASTER AND SERVANT—LIABILITY FOR WILLFUL INJURY TO TRESPASSER.—A railroad engineer, who intentionally throws steam and hot water upon a trespasser, in order to drive him from his engine, is guilty of an intentional and willful, and not a merely negligent, wrong; and in such case the railroad company is liable. (*Galveston etc. Ry. Co. v. Zantzinger*, 859.)

9. MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACTS OF SERVANT.—An act done by a servant within the scope of his general authority, in furtherance of the master's business and for the accomplishment of the object for which the servant is employed, renders the master liable, although such particular act was expressly forbidden by the master, and unlawful in itself. (*Burnett v. Oechsner*, 880.)

10. MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.—If a servant in charge of his master's farm, with authority to keep hogs from trespassing thereon, first catches and then hauls some trespassing hogs, belonging to a third party, into another state, where he unloads them at a hog ranch belonging to the master, the latter is liable for such act of the servant, although it is unauthorized, because it is in the line of his

employment, and in furtherance of the master's business. (*Burnett v. Oechsner*, 880.)

See Damages, 11, 12; Railroads, 8; Statutes, 4.

MECHANICS' LIENS.

MECHANICS' LIENS—VESTED RIGHT—CHANGE IN STATUTE.—A mechanic's lien fixed and secured under an existing statute becomes a vested right, and no subsequent repeal or modification of such statute can affect such right. (*Waters v. Dixie Lumber etc. Co.*, 281.)

MISDEMEANOR.

See Arrest.

MORTGAGES.

1. MORTGAGE OF STREET RAILWAY PROPERTY, INCLUDING REALTY AND PERSONALTY IN ONE INSTRUMENT—VALIDITY OF.—A mortgage of street railway property, including personalty as well as realty, not executed in conformity with the requirements of the statute concerning chattel mortgages, but only as a mortgage of real property, is void as to creditors of the mortgagor which attach the personal property. (*Bishop v. McKillican*, 68.)

2. MORTGAGE FOR ADEQUATE CONSIDERATION—VALIDITY OF, AS AGAINST EXISTING CREDITORS.—A mortgage given by a corporation to secure bonds issued by it is valid, as against existing creditors, even though accompanied by an agreement that its execution should be kept concealed, and that it should not be recorded within the time prescribed by law, where it appears that the security given was for an adequate consideration received. (*American etc. Bank v. McGettigan*, 345.)

3. MORTGAGES—ATTORNEY'S FEE FOR COLLECTION.—A mortgage note may validly stipulate for the payment of an attorney's fee for its collection. (*Millsaps v. Chapman*, 547.)

4. MORTGAGES—RIGHTS OF JUNIOR LIENOR.—The holder of a mortgage or other lien against property may discharge any prior lien existing against it for his own protection, and, for the purpose of reimbursing himself, add the amount due on the lien discharged to his own lien upon the property, and it is not necessary that this right should be stipulated for in an express contract between the property owner and the holder of the lien. (*New England Loan etc. Co. v. Robinson*, 657.)

5. MORTGAGES—RIGHTS OF ASSIGNEE.—The provisions of a mortgage are not personal to the mortgagee, but inure to the owner of any part of the debt secured. (*New England Loan etc. Co. v. Robinson*, 657.)

6. MORTGAGES—ASSIGNMENT OF BOND COUPON.—The detaching of an interest coupon from a bond by the owner thereof, and transferring it to a third person, operate as an assignment pro tanto of the mortgage which secures the entire debt. (*New England Loan etc. Co. v. Robinson*, 657.)

7. MORTGAGES.—A CONTINGENT REMAINDER in real estate may be mortgaged. (*People's Loan etc. Bank v. Garlington*, 800.)

8. MORTGAGES—PREMATURE FORECLOSURE AS TO LIFE TENANT.—Upon breach of the condition of a mortgage, by a contingent remainderman, there may be a foreclosure and sale of

whatever interest the mortgagor has in the mortgaged premises, without waiting until the happening of the condition upon which the remainder would become vested. Hence, such a suit is not premature as to the life tenant in possession, especially where he denies the title of the mortgagee and mortgagor, and asserts it in himself. (People's Loan etc. Bank v. Garlington, 800.)

See Execution, 17; Receivers, 4-6; Statutes, 2; Suretyship, 2-5; Trusts, 10; Vendor and Purchaser, 1-3.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING FLAGMAN AT RAILWAY CROSSING.**—Under a municipal charter granting to the city "the general powers possessed by municipal corporations at common law," and conferring on such city the care, control, and management of the streets within its limits, and containing a general clause giving to the members of the city council "full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, correct, and repeal all such ordinances, rules, and by-laws for the government and good order of the city, for the suppression of vice as they shall deem expedient," neither the city nor its council has power, express, implied, or otherwise, to adopt an ordinance requiring a railway company to maintain a flagman at such street crossings as such counsel may require. (Red Wing v. Chicago etc. Ry. Co., 482.)

2. **MUNICIPAL CORPORATIONS—ORDINANCE REQUIRING FLAGMAN AT RAILWAY CROSSING.**—A city ordinance requiring a railway company to maintain a flagman at certain street crossings is void, and not a lawful exercise of the police power of the city. (Red Wing v. Chicago etc. Ry. Co., 482.)

3. **MUNICIPAL CORPORATIONS—VOID ORDINANCE—RATIFICATION BY AMENDMENT OF CHARTER.**—An amendment to a city charter providing that all ordinances of such city theretofore enacted shall remain in force, does not validate an unauthorized and void ordinance. (Red Wing v. Chicago etc. Ry. Co., 482.)

4. **MUNICIPAL CORPORATIONS—CARE OF STREETS AND HIGHWAYS—DUTY TO PROVIDE GUARDS.**—Whenever, owing to the existence of embankments or excavations alongside of a public street or highway it would be reasonably prudent and necessary to erect and maintain railings, or other suitable barriers, to prevent accidents to passengers traveling along, coming into, or leaving such street or highway at customary and proper points, it is the duty of the proper municipality to provide such guards or barriers, and its neglect to do so renders it liable in damages to those who, in the exercise of ordinary and reasonable care, themselves sustain injury in consequence of such neglect. (O'Malley v. Parsons, 778.)

5. **MUNICIPAL CORPORATIONS—CARE OF STREETS—NEGLIGENCE, WHEN QUESTION FOR JURY.**—If, in an action against a municipality to recover for injuries from being thrown over an embankment while driving along a public street or highway recently excavated, and then undergoing repair, without guards or barriers, the evidence shows that the accident happened on a dark night, that plaintiff did not know of the alterations in the street, that prior to such alterations the street was safe, that there was plenty of public ground under the exclusive control of the municipality on which suitable guards or barriers could have been erected, the questions of the negligence of the municipality in

thus leaving the street unguarded, and of the contributory negligence of the plaintiff in thus driving along the street, are both questions of fact for the jury to determine under proper instructions. (*O'Malley v. Parsons*, 778.)

6. MUNICIPAL CORPORATIONS—INVALID STREET ASSESSMENT—BENEFIT TO LOTS.—If a statute provides that if, for any reason, recovery for street improvement cannot be had in accordance with the assessment made on the front foot rule, it may be allowed according to the standard of benefits to the lot assessed, an abutting property owner is not required to enter into the question of benefits in order to defend against an invalid assessment under the front foot rule. (*Hutcheson v. Storrie*, 884.)

7. MUNICIPAL CORPORATIONS — STREET IMPROVEMENT—ASSESSMENT—ESTOPPEL.—The failure of a person who owns property abutting on a street to appear when opportunity is afforded to contest the validity of an assessment for street improvement, in default of which a statute provides that he shall be estopped from contesting the validity of such assessment, does not estop him from showing that it is invalid, because the statute authorizing it is unconstitutional in this, that it authorizes such assessment in a sum materially exceeding the special benefits which such property can derive from the improvement. (*Hutcheson v. Storrie*, 884.)

8. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENT—ESTOPPEL.—A person owning property abutting upon a street is not estopped to deny the validity of an assessment for street improvements, when such assessment is made without any fair opportunity given to such owner to contest its correctness. (*Hutcheson v. Storrie*, 884.)

9. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—CONSTITUTIONAL LAW.—The state legislature cannot authorize a municipal corporation to assess upon abutting property the cost of street or public improvement, without regard to benefits derived, and make such assessment conclusive upon the owner without an opportunity to contest the question of benefits. Such an assessment is null and void as a whole, and not merely as to so much thereof as may be shown to be in excess of the benefits received. (*Hutcheson v. Storrie*, 884.)

10. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—CONSTITUTIONAL LAW.—The state legislature cannot authorize a municipal corporation to assess upon abutting property the cost of street improvement or public improvements in a sum materially exceeding the special benefits which that property may derive from the work. (*Hutcheson v. Storrie*, 884.)

11. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—CONSTITUTIONAL LAW.—A provision in a city charter authorizing the improvement of streets at the cost of abutting property, in proportion to frontage, without regard to special benefits to the property, is unconstitutional and void. (*Hutcheson v. Storrie*, 884.)

12. MUNICIPAL CORPORATIONS — LIMITATIONS ON INDEBTEDNESS.—In case warrants, or other evidences of indebtedness, are issued by a county for ordinary current expenses in excess of the taxes for the current year, without the consent or approval of the people, or in case the maximum constitutional limit of indebtedness has been reached, then such indebtedness is not a part of the public debt, and no tax can be levied to pay it, although it has been reduced to judgment. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

13. MUNICIPAL CORPORATIONS—LIMITATION ON TAXATION AND INDEBTEDNESS.—A TAX LEVY FOR COURT EXPENSES by a county, in excess and exclusive of the constitutional limit upon the annual tax for county revenue, is unauthorized and void. (Grand Island etc. R. R. Co. v. Baker, 926.)

14. MUNICIPAL CORPORATIONS—LIMITATION ON TAXATION FOR INDEBTEDNESS—SALARIES OF OFFICERS—BOUNTIES.—A tax to raise a fund to pay salaries of county officers, and valid bounties for the destruction of predatory wild animals, in excess of the constitutional limit for county revenue, and creating an indebtedness in excess of the constitutional limit, is unauthorized and invalid. (Grand Island etc. R. R. Co. v. Baker, 926.)

15. MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—JUDGMENTS—CONSTITUTIONAL LAW.—A statute requiring a judgment against a county to be paid by taxes does not contemplate nor include a tax in excess of constitutional limitations. (Grand Island etc. R. R. Co. v. Baker, 926.)

16. MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—JUDGMENTS.—In determining the power of a county, under constitutional limitations, to levy taxes to pay judgments against the county, the latter partake of the character of and are governed by the same rules as to validity as the original claims upon which they are based. (Grand Island etc. R. R. Co. v. Baker, 926.)

17. MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—PUBLIC DEBT.—If a county's indebtedness is within the constitutional limitation, and in pursuance of law, and it creates a debt in excess of the current taxes by the consent and approval of the people, which, together with existing indebtedness, does not exceed the amount within which it may lawfully become indebted, such debt is not only legal, but, although it may be evidenced alone by warrants, constitutes a part of the public debt, and to pay it a tax is permissible. (Grand Island etc. R. R. Co. v. Baker, 926.)

18. MUNICIPAL CORPORATIONS—LIMITATION ON TAXATION AND INDEBTEDNESS.—Judgments in favor of a landowner for damages as compensation for the exercise of the right of eminent domain in constructing and opening a public road through his land, are payable out of the ordinary county revenue, and a tax levy to pay such a judgment in excess of the constitutional limit upon the annual tax for county revenue, is unauthorized and void. (Grand Island etc. R. R. Co. v. Baker, 926.)

19. MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—PUBLIC DEBTS, to pay which a county is authorized to levy taxes in addition to the constitutional limit, upon the annual tax for county revenue, are not confined to bonded indebtedness, and may, but do not necessarily, include ordinary warrants and other lawfully issued evidences of indebtedness, and also judgments. (Grand Island etc. R. R. Co. v. Baker, 926.)

20. MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—SALARIES OF OFFICERS are within constitutional limitations upon the creation of county indebtedness. (Grand Island etc. R. R. Co. v. Baker, 926.)

21. MUNICIPAL CORPORATIONS—LIMITATIONS ON INDEBTEDNESS.—Within the meaning of constitutional limitations, upon the creation of county indebtedness, no distinction exists be-

tween debts imposed by law and those voluntarily assumed, and it makes no difference whether the debts are incurred for necessary current expenses or not. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

22. MUNICIPAL CORPORATIONS—LIMITATIONS UPON INDEBTEDNESS.—Bounties for the destruction of predatory wild animals, provided by statute, are within constitutional limitations upon the creation of county indebtedness. (*Grand Island etc. R. R. Co. v. Baker*, 926.)

See Cemeteries, 2, 3; Constitutions, 2, 3; Nuisance, 1; Police Power; Statutes, 3, 6.

NAMES.

NAMES—IDEM SONANS.—"O'Shea" and "Shea" are not the same names nor idem sonans. (*Clary v. O'Shea*, 465.)

See Ejectment.

NEGLIGENCE.

1. NEGLIGENCE TO CHILDREN—STREET RAILWAYS.—It is negligence for the motorman on a street-car to allow a boy thirteen years old, not a passenger, but riding for amusement, to alight therefrom while the car is in motion, for the purpose of turning the trolley, and the company is liable in damages for an injury thus received by the boy. (*Pueblo Elec. St. Ry. Co. v. Sherman*, 116.)

2. NEGLIGENCE TO CHILDREN—STREET RAILWAYS—INSTRUCTIONS.—In an action to recover for an injury to a boy thirteen years of age possessed of usual intelligence, caused by alighting from a street-car while in motion, where he was riding, not as a passenger, but for amusement, it is error to refuse to instruct the jury that, if he had been warned of the danger of alighting from a moving car, he was guilty of negligence precluding his recovery when there was evidence of such warning. (*Pueblo Elec. St. Ry. Co. v. Sherman*, 116.)

3. NEGLIGENCE—EVIDENCE—ADMISSIONS.—In an action to recover for personal injury caused by negligence, if a witness testifies that plaintiff, shortly after the injury, stated that he himself was to blame therefor, and plaintiff testifies that if he made such statement, which he does not remember, it was made under the influence of drugs given to alleviate his pain, the defendant may introduce evidence to prove that the statement was made before any drug was administered to plaintiff. (*Pueblo Elec. St. Ry. Co. v. Sherman*, 116.)

4. NEGLIGENCE OF CHILDREN.—The law fixes no arbitrary period when the immunity of childhood ceases and the responsibility of life begins, and minors, not *prima facie sui juris*, are charged with such care only to avoid danger as may be fairly and reasonably expected from persons of their age; and that is a matter to be determined in each case by its own circumstances. (*Pueblo Elec. St. Ry. Co. v. Sherman*, 116.)

5. NEGLIGENCE OF CHILDREN—QUESTION FOR JURY. If there is a fair doubt as to the child being of the age and capacity that in law it should be held responsible for the act contributing to its injury, the question should not be submitted to the jury to say whether this is so or not. (*Pueblo Elec. St. Ry. Co. v. Sherman*, 116.)

6. NEGLIGENCE OF CHILDREN—QUESTION FOR JURY. If a boy, thirteen years of age, possessing usual intelligence, is injured in alighting from a moving street-car, it is a question for

the jury whether or not, taking into consideration his age and the attendant circumstances, he was guilty of contributory negligence in thus alighting from the car. (*Pueblo Elec. St. Ry. Co. v. Sherman*, 116.)

7. **NEGLIGENCE. WHAT IS.**—One cannot be guilty of negligence, unless through some act or omission of his own, or through that of his servant or agent. (*Bartram v. Sharon*, 225.)

8. **NEGLIGENCE.—WHEN THE CULPABLE NEGLIGENCE** of each of two persons is the proximate cause of injury to another, the injured party may recover his whole damage from either or both of the wrongdoers. (*Bartram v. Sharon*, 225.)

9. **NEGLIGENCE—CONTRIBUTORY—BURDEN OF PROOF.** In Connecticut, in actions based upon negligence, the burden of proof is upon the plaintiff to show the use of ordinary care upon his part. (*Bartram v. Sharon*, 225.)

10. **NEGLIGENCE—PASSENGER DETAINED BY, AND INJURED AT HOTEL—LIABILITY OF CARRIER.**—If, through the negligence of a railroad conductor, a passenger has been carried beyond his destination, such conductor cannot, without express authority, constitute the proprietor of a hotel unconnected with the railway company its agent to care for such passenger until he can return on the company's train to his destination, and the company cannot be held liable for injury sustained by such passenger at the hotel in consequence of the negligence of the hotel proprietor. In such a case, the negligence of the railway company is the remote, and not the proximate, cause of the injury. (*Central etc. Ry. Co. v. Price*, 246.)

11. **NEGLIGENCE—CONTRIBUTORY.**—One who voluntarily incurs peril caused by the negligence of another in order to save the life of one imperiled by the same negligence is not debarred from recovery for injury thus received, upon the ground of his own contributory negligence. (*Maryland Steel Co. v. Marney*, 441.)

12. **NEGLIGENCE.—THE PROXIMATE CAUSE** of injury to one who voluntarily interposes to save the life of a person imperiled by another's negligence is the negligence which caused the peril. (*Maryland Steel Co. v. Marney*, 441.)

13. **NEGLIGENCE.—PROXIMATE CAUSE** does not necessarily mean the direct cause in point of time, but may mean the nearest by relation; and remote cause does not mean remote in point of time, but merely in its connection with the primary cause. (*Maryland Steel Co. v. Marney*, 441.)

14. **NEGLIGENCE—PROXIMATE CAUSE.**—The predominating cause in the production of an injury must be regarded as the proximate cause, although there may be subordinate and dependent causes co-operating to the same end. (*Maryland Steel Co. v. Marney*, 441.)

15. **NEGLIGENCE—CONTRIBUTORY.**—The fact that the injured person did some act by which he incurred or increased danger, does not necessarily involve negligence which prevents recovery, when the danger was created by some wrongful act of the master or of a third person. (*Maryland Steel Co. v. Marney*, 441.)

16. **NEGLIGENCE—CONTRIBUTORY.**—When one risks his life, or places himself in a position of great danger in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, such exposure, or risk, for such person is not negligence. (*Maryland Steel Co. v. Marney*, 441.)

17. **NEGLIGENCE—EXEMPLARY DAMAGES.**—Mere negligence, unless so gross as to amount to positive bad faith, is no

ground for awarding exemplary damages. (*Peterson v. Western Union Tel. Co.*, 461.)

18. **NEGLIGENCE—EXEMPLARY DAMAGES.**—Mere negligence on the part of a telegraph company in allowing its operator to transmit a libelous message is not ground for exemplary damages. (*Peterson v. Western Union Tel. Co.*, 461.)

19. **NEGLIGENCE—WILLFUL—CONTRIBUTORY.**—If a plaintiff who has suffered from an intentional and willful tort has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a willful omission, he cannot recover for the damages which might have been prevented by proper care, but he can recover his full damages when he has been guilty of ordinary negligence only. (*Galveston etc. Ry. Co. v. Zantzing*, 859.)

20. **NEGLIGENCE—WILLFUL—CONTRIBUTORY.**—If a railroad engineer throws steam and hot water upon a trespasser, with intent to drive him from his engine, and the trespasser is guilty of contributory negligence in attempting to jump from the engine to a car attached thereto, and thereby adds to his injury, he is still entitled to recover all damages resulting from the willful assault by the engineer. (*Galveston etc. Ry. Co. v. Zantzing*, 859.)

21. **NEGLIGENCE—WILLFUL—CONTRIBUTORY.**—If the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover unless the act of the defendant is willful, and, in the latter event, the injured party may recover, although his contributory negligence caused damage not intended by the defendant. (*Galveston etc. Ry. Co. v. Zantzing*, 859.)

See Banks and Banking, 8-14; Carriers; Explosives, 1; Master and Servant, 2, 3; Municipal Corporations, 5; Railroads, 6, 7, 17; Telegraph Companies, 1, 3.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS—WRITTEN ACCEPTANCE—ORAL EVIDENCE TO VARY.**—An absolute and unqualified written acceptance of a bill of exchange cannot be cut down to a conditional one, even by the clearest proof of a contemporaneous oral agreement to that effect. (*Burns etc. Lumber Co. v. Doyle*, 235.)

2. **NEGOTIABLE INSTRUMENTS—ACCEPTANCE—ORAL EVIDENCE TO VARY.**—If the written acceptance of a negotiable instrument was delivered to the plaintiff upon an oral condition, assented to by him, that it was not to become operative, or have any existence at all as an acceptance, until the happening of a condition, that condition, if proved, would avail the defendant, and under proper pleadings evidence of such a conditional delivery would be admissible. (*Burns etc. Lumber Co. v. Doyle*, 235.)

3. **NEGOTIABLE INSTRUMENTS—ACCEPTANCE—PLEADING ORAL AGREEMENT TO VARY.**—An answer which alleges that an absolute written acceptance was made upon an oral condition that the defendant should not be called upon to pay it, or be liable upon it, except in a certain stated contingency, sets up a conditional oral acceptance, and not a conditional delivery of an acceptance, and is, therefore, of no benefit to the defendant. (*Burns etc. Lumber Co. v. Doyle*, 235.)

4. **NEGOTIABLE INSTRUMENTS—ACTION ON CHECK—NOTICE OF DISHONOR—SUFFICIENCY OF COMPLAINT.**—In an action against the drawer of a check, it is necessary to allege

presentment and dishonor, but it is not necessary to allege that notice of such dishonor was given to the defendant. (*Spink etc. Drug Co. v. Ryan Drug Co.*, 477.)

5. **NEGOTIABLE INSTRUMENTS—POSSESSION AS EVIDENCE OF TITLE.**—The possession of a note, or other negotiable instrument payable to bearer, is prima facie evidence of the holder's ownership. (*New England Loan etc. Co. v. Robinson*, 657.)

6. **NEGOTIABLE INSTRUMENTS—COUNTERMANDING ORDERS OR DRAFTS FOR THE PAYMENT OF MONEY.**—If one who has money in another's hands, subject to the former's order, makes a draft thereon, for value, in favor of a third person, he cannot, after presentment thereof to the drawee, although it has not been accepted in writing, countermand the payment of the order except for fraud, want of value, or similar grounds. The simple fact that the drawer has changed his mind is not enough to divert the fund from the holder of the draft. (*McGahan v. Lockett*, 796.)

7. **NEGOTIABLE INSTRUMENTS—CONSIDERATION.**—Notes executed by third parties to a woman, in consideration of her written release of another from all claims for damages for a breach of promise to marry her made by such other, are based upon a sufficient consideration, although the latter was not a party to the notes and did not authorize their execution. (*Barrett v. Mahnken*, 953.)

8. **NEGOTIABLE INSTRUMENTS—CONSIDERATION—DURESS.**—Notes, the consideration for which is the release by the payee of a third person from all claim for damages for breach of promise to marry, are valid, and though made under threats to kill such third person, at that time in another state, they are not executed under duress. (*Barrett v. Mahnken*, 953.)

9. **NEGOTIABLE INSTRUMENTS—CONSIDERATION.**—A valid consideration for a note may consist of an injury to the payee, as well as of a benefit to the maker or to a third person. (*Barrett v. Mahnken*, 953.)

See Suretyship, 11-13.

NEW TRIAL.

1. **NEW TRIAL—ERROR IN CHARGE of the court as to the burden of proof** is not cause for a new trial, when another trial could not legally result in a different verdict. (*Brunswick Grocery Co. v. Brunswick etc. R. R. Co.*, 249.)

2. **NEW TRIAL CANNOT BE GRANTED on the ground** that the trial judge refused to inquire whether any of the jurors were disqualified by reason of relationship, when it is not shown that any disqualified juror was placed upon the panel. (*Carter v. State*, 262.)

3. **NEW TRIAL—COMPETENCY OF JUROR—DISCRETION OF COURT.**—The fact that the trial judge held, upon conflicting testimony, which would warrant a finding either way, that a certain juror was competent to try the accused is not an abuse of discretion, nor ground for a new trial. (*Carter v. State*, 262.)

4. **NEW TRIAL—REFUSAL TO GIVE REQUESTED INSTRUCTIONS.**—A refusal to give a requested charge to the jury so fully covered by general instructions already given that the jury could not be mistaken as to the law on the point in question, is not error nor cause for a new trial. (*Carter v. State*, 262.)

NOTICE.

See Assignment, 1, 2; Building and Loan Associations, 4; Chattel Mortgages, 1; Contracts, 12; Deeds, 1-3; Evidence, 8; Execu-

tion, 16; Husband and Wife, 1; Landlord and Tenant, 5, 7; Insurance, 14; Liens, 2; Negotiable Instruments, 4; Suretyship, 2, 3; Trusts, 8-11; Vendor and Purchaser, 4.

NUISANCE.

1. **NUISANCES—ABATEMENT—ACTION BY CITY.**—A city authorized by its charter to abate or compel the abatement of public nuisances, has power to compel the abatement of a nuisance affecting the comfort or convenience of the public, although it is not injurious to the public health; and therefore it may maintain an equitable action to aid in compelling an abatement of such nuisance. (*Red Wing v. Guptil*, 485.)

2. **NUISANCE—ACCUMULATION OF SURFACE WATERS—ACTION FOR DAMAGES.**—No action for damages can be sustained against railroad companies, or other landowners, for the damming up and accumulating of surface waters upon their lands unless a nuisance per se is thereby created. (*Baltzeger v. Carolina etc. Ry. Co.*, 789.)

3. **NUISANCE—ACCUMULATION OF SURFACE WATERS—ABATEMENT—SUFFICIENCY OF COMPLAINT.**—The allegations of a complaint to abate the accumulation of surface waters alongside of a railroad track as a nuisance are insufficient, unless they show the existence of a nuisance per se; that is, something creating danger, at all times, and under all circumstances to life, health, or property. (*Baltzeger v. Carolina etc. Ry. Co.*, 789.)

4. **NUISANCE—ACCUMULATION OF SURFACE WATERS IS SUBJECT TO LAW OF.**—The right of railroad companies, or other landowners, to dam up and accumulate surface waters on their premises is subject to the general law of nuisances, but they are not answerable, as for a nuisance, without it appears that a nuisance per se has, in fact, been created. (*Baltzeger v. Carolina etc. Ry. Co.*, 789.)

5. **NUISANCE—ACCUMULATION OF SURFACE WATERS—ACTION FOR DAMAGES.**—A nuisance caused by a railroad company or other landowner in damming up and accumulating surface waters in a town, is public in its nature, but one who suffers thereby cannot recover damages therefor without alleging some special or peculiar damage to himself. Unless it differs in kind, as well as degree, from the damage which it may be reasonably expected will be sustained by the public generally, the complaint states no cause of action. (*Baltzeger v. Carolina etc. Ry. Co.*, 789.)

See Cemeteries, 1.

OFFICERS.

1. **OFFICERS DE FACTO AND DE JURE—USURPATION OF OFFICE.**—The acts of a person who cannot under any circumstances become a de jure officer, and who has assumed to act officially in reference to an assessment for local improvements, and to perform certain duties which have been conferred by law upon a board of public works existing de jure, as well as de facto, at the same time, are unauthorized and void. (*State v. District Court*, 480.)

2. **OFFICERS DE JURE AND DE FACTO—USURPATION OF OFFICE.**—If a person who is not, and cannot be, an officer de jure, because there is not an office de jure to be filled, has intruded into and usurped the functions and performed the acts required by law to be done by officers who exist at the time, de facto as well as de

jure, such law has not been complied with, and such acts are unauthorized and void. (State v. District Court, 480.)

See Arrest, 2; Municipal Corporations, 14-20; Replevin, 2-11.

PARTIES.

PARTIES—WAIVER OF DEFECT IN.—A person, by answering over, after demurrer, on the ground of defect of parties, waives the right to raise that question on appeal. (Zang v. Wyant, 145.)

See Corporations, 7; Cotenancy, 3; Insurance, 1, 2; Pleading, 6; Replevin, 10, 11.

PARTITION.

PARTITION—CONFLICTING TITLES—ESTOPPEL.—If, in an action for the partition of land, the issue arising upon the conflicting legal titles is tried without objection, and the title is conclusively established in favor of one of the parties, the adversary party cannot be heard to question the correctness and binding effect of such judgment. (Carson v. Broady, 691.)

See Cotenancy, 7; Homestead, 3.

PARTNERSHIP.

1. PARTNERSHIP—ACCOUNTING—PLEADINGS.—In an action between partners for the recovery of the alleged profits of a business, an answer alleging that such partnership was formed for the purpose of procuring an unlawful contract out of which such profits arose is not subject to general demurrer, on the ground that from the pleading the contract appears to bear a date prior to that of the formation of the partnership. (Wiggins v. Bisso, 837.)

2. PARTNERSHIP—ILLEGAL—ACTION FOR PROFITS—PLEADING.—In an action between partners for the recovery of the profits of a partnership business, an answer alleging the illegality of the partnership presents a defense. (Wiggins v. Bisso, 837.)

3. PARTNERSHIP—REPRESENTATIONS BY PARTNER—EFFECT ON COPARTNER.—Representations made by a partner in transferring a note which has become his individual property, do not bind his copartner, though such transfer is made with intent to apply the note to the payment of a partnership debt which has been assumed by the transferring partner. (Spencer v. Jones, 870.)

4. PARTNERSHIP—SINGLE TRANSACTION.—A partnership may exist in a single transaction of purchasing land with a view of selling it for profit. (Spencer v. Jones, 870.)

5. PARTNERSHIP—SINGLE TRANSACTION—DIVISION OF ASSETS.—If partners in a single transaction of purchase of land and sale for profit divide among them the notes of their vendees given for the purchase price of the land, the notes taken by each party become his individual property, whether the transaction works a dissolution of the partnership or not. (Spencer v. Jones, 870.)

See Injunction, 1; Setoff; Vendor and Purchaser, 4.

PAYMENT.

See Banks and Banking, 1.

PLEADING.

1. CORPORATIONS—CORPORATE EXISTENCE—PLEADING—DENIAL—ADMISSION.—An allegation of corporate exist-

tence, if not denied, is deemed to be admitted. (*Moynihan v Drobaz*, 46.)

2. PLEADING—ILLEGALITY OF CONTRACT IS AVAILABLE ON DEMURRER, WHEN—INJUNCTION.—If it appears from the face of the complaint that a contract is void as being in restraint of trade, the complaint is demurrable for insufficiency of facts. The maxim, *Ex turpi causa non oritur actio*, applies in such a case, where an injunction is sought to restrain the defendant from engaging in business contrary to the terms of a void contract. (*Merchants' Ad-Sign Co. v. Sterling*, 94.)

3. PLEADING TO OBTAIN INJUNCTION.—A complaint is sufficient if, upon any state of proof which its allegations justify, the court can, in the reasonable exercise of judicial discretion, grant an injunction. (*New York etc. R. R. Co. v. Scoville*, 159.)

4. PLEADING—CLAIM FOR RELIEF.—Where a complaint contains several counts, separate claims for relief should follow the complaint as a whole and not be appended to each separate count. (*Baxter v. Camp*, 169.)

5. PLEADING—JOINDER OF CAUSES OF ACTION.—Several causes of action may be stated in a single count, when such causes of action are not separate and distinct from one another: that is, separable from each other by some distinct line of demarcation. (*Maisenbacker v. Society Concordia*, 213.)

6. PLEADING—JOINDER OF PARTIES—DEMURRER.—When several persons join in an action, the complaint must show a good cause of action in all, or it is insufficient on demurrer for want of facts. (*American etc. Bank v. McGettigan*, 345.)

7. PLEADING AND PRACTICE—DEMURRER.—The validity of a contract cannot be considered on the hearing of a demurrer to a declaration averring that such contract was never assented to. (*St. Clair v. Kansas City etc. R. R. Co.*, 534.)

See Attachment, 9; Limitation of Actions; Master and Servant, 3; Negotiable Instruments, 3, 4; Nuisance, 3; Parties; Partnership, 12; Railroads, 8, 15; Receivers, 6; Service, 2, 5; Suretyship, 4.

PLEDGE.

1. PLEDGE OF BANK STOCK BY DIRECTOR OF BANK—VIOLATION OF STATUTE PROHIBITING DIRECTOR FROM BORROWING FUNDS OF BANK—EFFECT OF.—The violation of a statute providing that no director of a savings bank shall borrow its funds, and that, if he does so, his office shall become vacant, is a matter of which the state or sovereign power only can take advantage, particularly after the transaction is executed. It does not prevent the bank from maintaining an action to recover the money. Hence, it cannot be invoked to defeat a pledge of stock made by such director, for money borrowed from the bank, and the bank can hold the pledged stock, or its proceeds, in a suit for the recovery of the same, until the money loaned upon the faith of the pledge is repaid. (*Brittan v. Oakland Bank of Savings*, 58.)

2. PLEDGE—CONVERSION OF PLEDGED BANK STOCK—ACTION FOR—INADMISSIBLE EVIDENCE.—If a bank receives, from an owner's agent, by way of pledge for the agent's individual benefit, a certificate of bank stock, indorsed with the owner's name in blank, and sells it at an invalid private sale, whereupon the owner sues the bank for a conversion of the stock, and the pledgor, the agent, has, in the meantime, become insolvent, evidence of an assignment by the bank of its claim in the insolvency proceedings against the insolvent pledgor, after applying the proceeds of

the illegal sale to the pledgor's account, and of the assignee's re-assignment thereof to the plaintiff in the action for conversion, is not admissible in evidence in the latter action, for it is not relevant to the issues involved. (*Brittan v. Oakland Bank of Savings*, 58.)

3. **PLEDGE—RESPECTIVE RIGHTS OF LIENHOLDER AND PLEDGEE'S ASSIGNEE.**—A lienholder who refuses, upon proper demand, to deliver the property without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after an action is commenced; but a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser, who will be allowed to hold the property until the extinguishment of the original obligation. (*Brittan v. Oakland Bank of Savings*, 58.)

4. **PLEDGE OF BANK STOCK BY AGENT—INVALID SALE BY PLEDGEE—RIGHTS OF PURCHASER.**—If an original owner of bank stock indorses it in blank and delivers it to his agent, with power to negotiate or pledge the same, a pledgee of such agent, who afterward takes the stock in good faith and for value, though the agent pledges it for his own individual benefit, has a special property in it and not a mere lien thereupon. He does not, therefore, lose all rights and interest therein by an invalid private sale thereof. The purchaser becomes a transferee of the pledge, and is entitled to hold it with the rights of the original pledgee, until the original obligation is extinguished. (*Brittan v. Oakland Bank of Savings*, 58.)

5. **PLEDGE OF BANK STOCK BY AGENT—STATUS OF OWNER—LIABILITY FOR MONEY ADVANCED.**—If an original owner has indorsed bank stock in blank and delivered it to his agent, with power to negotiate or pledge the same, he cannot recover from a pledgee of such agent, who afterward takes the stock in good faith and for value from the agent, who pledges it for his own individual benefit, without refunding, or offering to refund, the amount advanced by the second party to whom it is so pledged. (*Brittan v. Oakland Bank of Savings*, 58.)

6. **PLEDGE — CORPORATE STOCK — WIFE'S SEPARATE PROPERTY PLEDGED FOR HUSBAND'S DEBT—RELATIVE RIGHTS OF PARTIES.**—A bona fide pledge by a husband as security for his loan of corporate stock issued in his name and showing him to be the owner entitles the pledgee to hold the stock as against the wife of the pledgor, whose separate means were used in its purchase, and who had instructed her husband to purchase it in her name, and did not know of nor consent to its issuance in her husband's name, nor of its pledge by him for his own debt. The pledgee holding both the legal and equitable title to the stock, his claim must prevail. (*Anderson v. Waco State Bank*, 867.)

POLICE POWER.

1. **POLICE POWER—PROHIBITION—REGULATION.**—Under the guise of regulating a business, a municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. (*Los Angeles County v. Hollywood etc. Assn.*, 75.)

2. **POLICE POWER—REGULATION OF LAWFUL BUSINESS WITH NO INJURIOUS TENDENCY.**—If a business, such as conducting a cemetery for profit, is lawful, and has no injurious tendency, the municipal authorities cannot say who shall and who shall not exercise the right to follow it. Hence, any restriction, by virtue of the police power, upon the rights of individuals to

pursue it, must extend to all alike. The privilege of burial cannot be limited to one class of citizens, and denied to another class, within the same district. (*Los Angeles County v. Hollywood etc. Assn.*, 75.)

PRESUMPTION.

See Banks and Banking, 16; Cemeteries, 4; Contracts, 17; Cotenancy, 6; Deeds, 3; Fraudulent Conveyance, 9; Husband and Wife, 4; Instructions, 5.

PROCESS.

1. **PROCESS — DISTRESS WARRANT — AMENDMENT.**—Although a jurat is not attached to an affidavit in a distress warrant for rent, the warrant is not void. It may be amended when the oath was actually taken before the magistrate issuing the warrant. (*Beach v. Averett*, 239.)

2. **PROCESS.—DISTRESS WARRANT FOR RENT IS NOT VOID** because made returnable "to the next term of court," without designating what particular court, when the magistrate issuing the warrant has jurisdiction of the entire subject matter of the suit. (*Beach v. Averett*, 239.)

PROFANITY.

See Criminal Law, 4.

PUNISHMENT.

See Statutes, 12.

QUARANTINE.

See Railroads, 15.

RAILROADS.

1. **RAILROADS—RIGHT TO EXCLUDE THIRD PERSONS FROM PROPERTY.**—A railroad company has the same right belonging to every owner of real estate to exclude from entry upon it all who come without its consent and can show no superior legal title. (*New York etc. R. R. Co. v. Scovill*, 159.)

2. **RAILROADS—RIGHT OF ENTRY UPON PROPERTY OF.**—Independent of contract, a right of entry upon the property of a railroad company exists in all who wish to avail themselves of its services as a common carrier, and enter for that purpose at a proper place, so long as they pay due regard to the reasonable regulations established by the company. (*New York etc. R. R. Co. v. Scovill*, 159.)

3 **RAILROADS — RULE PROHIBITING HACK DRIVERS FROM PLYING TRADE ON STATION GROUNDS.**—The rule of a railroad company that no person should solicit the carriage of passengers or their baggage on its station grounds unless duly licensed by it, and prohibiting all owners and drivers of public hacks and express wagons not so authorized from plying their business on said grounds, does not prevent the driver of any vehicle from entering the station grounds to fulfill a contract of employment with a passenger or intending passenger. (*New York etc. R. Co. v. Scovill*, 159.)

4. **RAILROADS—SOLICITING ON GROUNDS OF.**—A railroad company may lawfully confine the business of soliciting the carriage of passengers and baggage upon its station grounds to one or

more licensees, provided such regulation is not inconsistent with the reasonable accommodation of its patrons. (New York etc. R. R. Co. v. Scovill, 159.)

5. RAILROAD COMPANIES—SLEEPING-CAR COMPANIES. The liability of a sleeping-car company to its passenger for personal baggage taken by him into the sleeping-car and of which he retains possession, is neither that of an innkeeper, a common carrier, nor an insurer, but is that of a bailee for hire. (Pullman Palace Car Co. v. Hall, 293.)

6. RAILROAD COMPANIES—SLEEPING-CAR COMPANIES—LIABILITY FOR THEFT.—A sleeping-car company is not liable as an insurer to a passenger for the loss by theft of personal property taken into the car by him and retained in his possession; but such company owes the passenger the duty of exercising reasonable care to guard his property from theft, and if, through want of such care, his property, such as he may reasonably carry with him, is stolen, the company is liable therefor. If, however, such care has been exercised by the company, and such goods have been stolen by a person not in its employ, it is not liable for the loss. (Pullman Palace Car Co. v. Hall, 293.)

7. RAILROAD COMPANIES—SLEEPING-CAR COMPANIES—LOSS BY THEFT.—THE BURDEN OF PROOF is on a sleeping-car company to show that it has exercised reasonable care to prevent the theft of personal property belonging to its passenger, taken into the car by him and retained in his possession until the theft. (Pullman Palace Car Co. v. Hall, 293.)

8. RAILROADS — ACTION FOR INJURY TO EMPLOYEE CAUSED BY COEMPLOYEE—COMPLAINT—SUFFICIENCY OF. In an action by a freight brakeman against a railroad company to recover damages for personal injuries resulting from the alleged negligence of the defendant's engineer, the complaint, under the Indiana statute, is good against a demurrer, for want of facts, where it states that the engineer, while in the service of the company, in charge of a locomotive, negligently injured the plaintiff, both being and acting at the time in the line of their duty as employes of the company. It is not necessary for it to state that, at the time of the injury, the engineer was acting in the place, and performing the duty, of the corporation. (Pittsburgh etc. Ry. Co. v. Montgomery, 301.)

9. RAILROADS — STREET RAILWAYS—WHO IS NOT A PASSENGER—TRESPASSERS.—A boy eight and one-half years old, riding on an open electric street-car, having wooden strips or slats placed on one side of it to prevent the ingress or egress of passengers, is not a passenger thereon, to whom the railway company owes the duty of safe carriage and immunity from injury, where he is in a place not intended for passengers; where he is not received as a passenger; where his presence is not known to the company's employes; where he does not conduct himself as a passenger; where he has not paid any fare, though he intends to do so, if called upon; and where the company's employes are not required to search for trespassers before starting the car. Hence, if he, being unable to get into the car, on account of its crowded condition, hangs on to the slatted side of it, and on the outside thereof, in a stooped and dangerous position, with his feet on the boxing of the axle, and holding on to a portion of a seat with his hands; but, being unable to continue his hold, falls off, and is injured, before reaching his destination, by the car running over him, he must be considered a trespasser and not a passenger, though the company's employes might have seen him, if they had examined that part of the car. (Udell v. Citizens' St. R. R. Co., 336.)

10. RAILROADS — STREET RAILWAYS — PASSENGER — READINESS TO PAY FARE.—The circumstance that a boy, who is riding on an electric street-car by hanging on to the outside thereof, has a nickel in his pocket with which to pay his fare, when called upon, does not make him a passenger. (*Udell v. Citizens' St. R. R. Co.*, 336.)

11. RAILROAD COMPANIES—OPENING STREETS ACROSS TRACKS.—In a proceeding by a city against a railway company to condemn a part of its track for the extension of a public street over or across such track, the judgment of condemnation does not take the land itself, or the exclusive use thereof, but the city acquires only a right of way, subject to the right of way of the railway company. (*Mayor etc. of Baltimore v. Cowen*, 433.)

12. RAILROAD COMPANIES—CONSTRUCTION OF STREET OR SEWER ACROSS RAILWAY TRACK—COMPENSATION FOR STRUCTURAL CHANGES.—If a new street or sewer is laid out and opened across an existing railway track, the railway company is entitled to compensation from the city for the cost of making and maintaining such structural changes in its roadbed and track as become necessary in order to protect and preserve the track for its former use. Such cost is not consequential but direct damage, as an invasion of the actual property rights of the company. (*Mayor etc. of Baltimore v. Cowen*, 433.)

13. RAILROAD COMPANIES — GUARDS AT CROSSINGS—COMPENSATION FOR STRUCTURAL CHANGES.—Cattleguards, crossing gates, the maintenance of flagmen, ringing of bells, and other things ordinarily required at railway crossings in populous communities, are matter of public safety, and within the police power, and when the duty to construct or maintain them has been imposed on the railway company by statute, no compensation therefor can be recovered. But this does not affect or qualify the rule that structural changes in the roadbed, made necessary by a new street or sewer crossing the track, must be paid for by the municipality opening such street or constructing such sewer. (*Mayor etc. of Baltimore v. Cowen*, 433.)

14. RAILROAD COMPANIES—EXCLUSION OF HACKMEN.—A railroad company cannot confer upon one person the exclusive privilege of entering its inclosed grounds to solicit the hack transportation of incoming passengers, and exclude all others from such inclosure who wish to engage in such business. Such privilege tends to create a monopoly. (*State v. Reed*, 528.)

15. RAILROAD COMPANIES — QUARANTINE—DAMAGES—SUFFICIENCY OF COMPLAINT.—A passenger may maintain an action against a railway company for damages sustained from quarantine regulations, under a declaration alleging that the company's agents informed such passenger that he could go through to his destination on the ticket sold him without hindrance from quarantine regulations, that he relied on such statements, that such agent knew that quarantine regulations were then in force, that he never signed nor assented to the stipulations in his ticket, did not know of their existence, and that he was prevented from reaching his destination by quarantine officers and employes of the railroad company. (*St. Clair v. Kansas City etc. R. R. Co.*, 534.)

16. RAILROAD COMPANIES—BAGGAGE—RULES.—A rule of a railway company that baggage shall not be checked until a ticket has been procured is a reasonable regulation, but a rule that a baggage-master shall not receive into the baggage-room baggage until a ticket shall have been procured is an imposition upon the public, unreasonable and void. (*Coffee v. Louisville etc. R. R. Co.*, 535.)

17. RAILROADS — STREET RAILWAYS — NEGLIGENCE—RIDING ON PLATFORM.—One who voluntarily rides upon the outside platform of an electric street-car, when there are vacant seats inside the car, is guilty of negligence per se, and, if injured while in such position through the negligence of the railway company, cannot recover damages therefor. (*Thane v. Scranton Traction Co.*, 767.)

See Agency; Constitutions, 1; Mortgage, 1; Municipal Corporations, 1, 2, 4; Negligence, 1, 2, 10, 20; Statutes, 2, 4, 7.

REAL PROPERTY.

REAL PROPERTY—DISCHARGED EMPLOYÉ'S RIGHT OF FREE ACCESS TO STORE IN WHICH HE CLAIMS A SHARE OF PROFITS.—A person who is merely employed as a salesman in a store, upon a salary, and who is discharged for neglect of duty, is not entitled, by virtue of his right to a share of the net profits, if any, to be allowed free access to the premises, in order to protect his interest therein, if the existence of such profits is denied, and it is not shown that, if there are such profits, his presence in the store is necessary for the protection of his share thereof. (*De Groot v. Peters*, 91.)

See Railroads, 1-3.

RECEIVERS.

1. RECEIVERS—REPLEVIN—LEAVE OF COURT—ATTACHMENT.—If a railroad company gives a mortgage upon its property, and subsequently acquires certain other personal property, which is attached by the sheriff upon the same day that an action is brought to foreclose the mortgage, a receiver, who has been appointed in the foreclosure proceeding, to take possession of the mortgaged property, cannot, without an order of court, maintain replevin to recover such personal property, where it has never been in his possession as receiver, but only as caretaker for the sheriff. (*Bishop v. McKillican*, 68.)

2. RECEIVERS—ATTACHMENT BEFORE APPOINTMENT OF—RIGHTS OF NONRESIDENT CREDITOR.—A nonresident creditor who attaches property of a Connecticut corporation in another state, before the corporation is placed in the hands of a receiver, may avail himself of such security, and, should it prove insufficient to satisfy his demand, he may present his claim for the balance in the same manner as any other creditor. In such a case, the net proceeds are all for which the execution creditor is accountable in the reduction of his demand. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

3. RECEIVERS — ATTACHMENT AFTER APPOINTMENT OF.—A nonresident creditor, who attaches and sells property of an estate after the estate has been placed in the hands of a receiver, and with equitable notice of the receiver's title, can be allowed to share as a creditor in the estate only after renouncing the benefit of the attachment and accounting for the property wrongfully converted. In such a case, the measure of liability is the fair value of the property at the date of the attachment, with interest. (*Ward v. Connecticut Pipe Mfg. Co.*, 207.)

4. RECEIVERS — ACTION BY, TO CANCEL MORTGAGE, NOT MAINTAINABLE, WHEN.—A receiver cannot maintain an action to cancel a mortgage on the trust property, where his complaint shows, upon its face, that the relief sought will place creditors who have an equity in a worse condition, and creditors who have no

equity in a better condition, than they occupied before his appointment. (American etc. Bank v. McGettigan, 345.)

5. RECEIVERS — ACTION BY, TO CANCEL MORTGAGE—CONFLICTING EQUITIES—PROPER PROCEDURE.—If a receiver brings an action to cancel an alleged fraudulent mortgage on the debtor's property, but his complaint shows facts indicating a controversy among the creditors as to equities in such property, which controversy cannot be fully adjudicated in the absence of the creditors holding the conflicting equities, the case presented is one of distribution, and the best course to pursue for a speedy settlement of such equities is not for the court to authorize a cross-action to foreclose the mortgage, but to order its receiver to sell the alleged mortgage property, free from liens of every character, under an order that all liens and claims be transferred to the fund. (American etc. Bank v. McGettigan, 345.)

6. RECEIVERS — ACTION BY, TO CANCEL MORTGAGE—PLEADING—DEMURRER, EFFECT OF.—In an action by a receiver to cancel a mortgage on the trust property, a demurrer to the complaint calls in question not only the sufficiency of the facts to constitute a cause of action, but also the right of the plaintiff to maintain the suit. (American etc. Bank v. McGettigan, 345.)

7. RECEIVERS—PRE-EXISTING LIENS — ENFORCEMENT OF.—When a court takes possession of the property of an insolvent corporation, and appoints a receiver, it holds the property impressed with all existing rights and equities of creditors, and the relative rank of claims and the standing of liens remain unaffected by the receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it. (American etc. Bank v. McGettigan, 345.)

8. RECEIVERS—DUTY OF, TO PROTECT PREFERENCES AND PRIORITIES.—It is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities, as it is to make a just distribution among the general creditors. (American etc. Bank v. McGettigan, 345.)

9. RECEIVERS — FOREIGN — COLLECTION OF ASSETS HERE BY SUIT—COMITY.—The courts of one state will, upon the principle of comity, permit the receiver of an insolvent corporation of another state to collect the assets of the concern by suit, in the former state, for general distribution among the creditors of the insolvent in both states, where such permission does not conflict with the policy of the state or infringe the interests of domestic creditors. (Wilson v. Keels, 816.)

10. RECEIVER—FOREIGN—COLLECTION OF ASSETS HERE BY SUIT—ESTOPPEL AGAINST RESIDENT CREDITOR.—If creditors residing in one state voluntarily go into another and prove their claims against the estate of an insolvent in the latter state, and accept dividends from its receiver, they are estopped from afterward objecting to a suit brought in the former state by such receiver to collect the assets of the insolvent in that state for general distribution among the creditors of both states. (Wilson v. Keels, 816.)

See Judgment, 5; Marriage and Divorce, 1, 8.

RECORDING.

See Deeds.

RELEASE.

See Contracts, 9.

REMAINDERS.

See Estates, 1-3, 6, 7; Jurisdiction; Mortgages, 7.

REPLEVIN.

1. **ATTACHMENT—REPLEVIN—EXECUTION.**—A party who has attached property, if it is replevied from him or from the attaching officer, must follow the replevin action to final judgment, and, if successful, satisfy his claim by an execution upon the judgment, and, failing in that, look to the replevin bond, and, failing in this, look to the negligence or bad faith of the officer in taking an insufficient replevin bond, if such were the facts. (Shull v. Barton, 698.)

2. **BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.**—An officer, before approving a replevin bond, should make such investigation and inquiry concerning the financial standing and solvency of the surety as a reasonably prudent man would make before extending credit to the surety to the amount of the bond. (Shull v. Barton, 698.)

3. **BONDS IN REPLEVIN—LIABILITY OF OFFICER.**—If a creditor attaches property as that of his debtor, and it is taken in replevin from the attaching officer and delivered to the claimant under a replevin bond, and the creditor, pending the replevin suit, takes the property on execution for the same debt for which he attached it, such seizure under execution is a defense for the officer in a suit against him by the creditor for negligently approving an insufficient replevin bond, and the creditor cannot set up the invalidity of the seizure under execution as a defense. (Shull v. Barton, 698.)

4. **BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.**—To escape liability for an insufficient surety on a replevin bond after it has been excepted to, and the officer has notice thereof, he must not be guilty of negligence, and, if he negligently approves such bond signed by insolvent or insufficient sureties, he is answerable for consequences. (Shull v. Barton, 698.)

5. **BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.**—The mere taking by an officer of the affidavit of a surety on a replevin bond that he is the owner of real estate in the county wherein the replevin action is pending, not exempt from execution, of twice the value of the replevied property, is of itself not enough to justify the officer in approving the replevin bond, and such affidavit does not of itself protect the officer from liability for an insufficient bond. (Shull v. Barton, 698.)

6. **BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.**—The fact that an officer acts in good faith in approving a replevin bond does not of itself protect him from liability for negligence in respect thereto. (Shull v. Barton, 698.)

7. **ATTACHMENT OF REPLEVIED PROPERTY.**—If property has been attached and then replevied, and replevin bond given, the plaintiff in the attachment, while the replevin bond is pending, cannot levy an attachment or execution thereon. (Shull v. Barton, 698.)

8. **BONDS IN REPLEVIN—APPROVAL OF—LIABILITY OF OFFICER.**—If the surety on a replevin bond is good, solvent, and sufficient when it is approved by the officer, the subsequent insolvency of the surety does not render the officer liable. (Shull v. Barton, 698.)

9. **BONDS IN REPLEVIN—APPROVAL—LIABILITY OF OFFICER.**—Under a statute providing that a sheriff or other officer

shall be responsible for the sufficiency of the sureties in a replevin bond taken by him, if such sureties are excepted to, until they justify, an officer approves a replevin bond at his peril, after exception to, and before justification of the sureties therein. (*Shull v. Barton*, 698.)

10. **BONDS IN REPLEVIN—ACTION AGAINST OFFICER—PARTIES.**—A sheriff, from whom attached property has been replevied, cannot, on the termination of the replevin suit in his favor, and the return unsatisfied of an execution on the judgment, maintain an action against an officer personally who took the property in replevin, for negligently approving an insufficient replevin bond. In such case, the creditor, and not the sheriff, is the real party in interest, although the sheriff may maintain an action on the replevin bond as the obligee named therein and trustee for the attaching creditor. (*Shull v. Barton*, 698.)

11. **BONDS IN REPLEVIN—ACTION AGAINST OFFICER.**—Several creditors, who have lost their claims against a debtor, and their attachment liens against his property, through a negligently approved and insufficient bond in replevin, cannot join as plaintiffs in a suit against the officer serving the writ of replevin for damages for negligently approving the replevin bond. (*Shull v. Barton*, 698.)

See Receivers, 1.

RESTRAINT OF TRADE.

See Contracts, 1, 2.

SALES.

SALES — COMMERCIAL AGENCIES — FALSE STATEMENT.—If a proposed buyer of goods, upon the request of a commercial agency, makes a statement of his financial condition which is reported by such agency, together with its own conclusions, to the proposed seller, a sale made on the faith of such report as a whole, and not particularly on the faith of the statement made by the proposed buyer, cannot be rescinded on the mere ground that such statement is false. (*Poska v. Stearns*, 688.)

SELF-DEFENSE.

See Homicide, 1, 2, 15-17, 20

SEPARATE PROPERTY.

See Husband and Wife, 3; Pledge, 6; Statutes, 1.

SERVICES.

1. **SERVICES—DEFENSE THAT WAGES WERE EARNED AFTER WRONGFUL DISCHARGE—SETOFF.**—In an action by an employé wrongfully discharged before the expiration of his term of service, the fact that he earned wages after his discharge may be set up by way of partial answer to reduce the amount of his recovery, but cannot be pleaded as a setoff. (*Hamilton v. Love*, 384.)

2. **SERVICES—COMPLAINT IN ACTION FOR—DEMURRER.** A complaint by an employé, in an action for his wrongful discharge, is good on demurrer, where it alleges a violation of the contract of employment, and the amount that the plaintiff would have earned under it. Nothing more than the loss of compensation agreed upon for the unexpired term need be shown, as this is a sufficient allegation of damages. (*Hamilton v. Love*, 384.)

3. SERVICES—WRONGFUL DISCHARGE OF EMPLOYÉ.—THE REMEDY of an employé, discharged without sufficient cause, before the expiration of the period of service stipulated for, is not in *assumpsit* as for implied services, or for wages, but is for damages for breach of the contract. (Hamilton v. Love, 384.)

4. SERVICES—WRONGFUL DISCHARGE OF EMPLOYÉ.—THE MEASURE OF DAMAGES for the wrongful discharge of an employé, before the expiration of the period of service stipulated for, is an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, and which probably, can, by reasonable diligence, be earned during the time covered by the breach. (Hamilton v. Love, 384.)

5. SERVICES — COMPLAINT — UNNECESSARY ALLEGATION—MATTERS OF DEFENSE.—It is not necessary, in an action by an employé wrongfully discharged before the expiration of his term of service, for the complaint to allege that, since the discharge of the employé, he has been unable to obtain employment, and has earned nothing. If he has, or, by the exercise of reasonable diligence, could have obtained employment, or earned wages after his discharge, the facts are matters of defense, and must be established by the employer. (Hamilton v. Love, 384.)

6. SERVICES—DISCHARGE OF EMPLOYÉ—INSUFFICIENT CAUSE FOR—OBSERVANCE OF RULES.—It is not good cause for the discharge of an employé before the expiration of his term of service, that he fails to observe his employer's rules for the conduct of business, where he does not have notice of such rules. (Hamilton v. Love, 384.)

7. SERVICES—DISCHARGE OF EMPLOYÉ—INSUFFICIENT CAUSE.—Trivial and unimportant acts of disobedience or negligence are not a good cause for the discharge of an employé before the expiration of his term of service, particularly after the employer has previously passed them without complaint. (Hamilton v. Love, 384.)

8. SERVICES—WRONGFUL DISCHARGE OF EMPLOYÉ—REMEDY.—An employé, who has been wrongfully discharged before the expiration of his term of service, may sue at once for a breach of the contract, and recover his full damages to the end of the term. Or he may sue after the expiration of the term, within the statutory limit, but the measure of damages is the same in either case, for there can be but a single action. (Hamilton v. Love, 384.)

SETOFF.

SETOFF—PARTNERSHIP.—A claim owing to a partnership cannot be set off against debts owing to a member of such partnership individually. (Olson v. Lamb, 670.)

See Services, 1.

SHERIFFS.

1. SHERIFFS—WRONGFUL ACTS—LIABILITY OF SURETIES.—The sureties of a sheriff are liable for his wrongful acts done *virtute officii*, but not for those done *colore officii*. Acts done *virtute officii* are such that, if properly done, they create no liability, but which, if neglected, or improperly done, or which involve an abuse of discretion, render the officer and his sureties liable. Acts *colore officii* are such as neither the office nor the writ gives the officer authority to do. and for the latter his sureties are not liable. (State v. Fowler, 452.)

2. SHERIFFS—WRONGFUL LEVY ON EXECUTION—LIABILITY OF SURETIES.—The levy of an execution by a sheriff upon a growing crop of fruit, which he forbids the owner to pick, and which he neglects to pick himself, thus causing its loss, is a wrongful act for which his sureties are liable in damages. (*State v. Fowler*, 452.)

3. SHERIFFS—LIABILITY OF SURETIES FOR LEVY OF EXECUTION.—The illegal and oppressive levy of an execution upon property subject thereto by a sheriff, is an official act for which his sureties are liable. (*State v. Fowler*, 452.)

See *Replevin*, 9, 10.

SHIPPING.

1. SHIPPING—ATTACHMENT OF VESSEL DOES NOT DISPLACE PRE-EXISTING LIEN.—A stipulation that, at the time of the commencement of an action to enforce a lien upon a steamer, for a balance due on a contract of construction, the vessel had been seized upon attachment and released upon a bond, does not justify a conclusion of law that the plaintiff did not have, at the time, a lien upon the steamer. (*Moynihan v. Drobaz*, 46.)

2. SHIPPING—REGISTRATION OF VESSEL AS EVIDENCE OF ITS OWNERSHIP.—An entry in the custom-house books of the registry or transfer of a vessel is not admissible in evidence for the purpose of showing ownership in the craft. It is not even *prima facie* evidence of ownership as against one not claiming to be an owner, unless the entry is shown to have been made by authority of the person named in it. (*Moynihan v. Drobaz*, 46.)

3. SHIPPING—DECREE AND PAPERS IN ADMIRALTY AS EVIDENCE OF OWNERSHIP OF VESSEL.—A decree and copies of papers in a libel suit against a vessel, brought in the United States district court, are not admissible in evidence, in an action brought to enforce a demand against the vessel, for the purpose of proving that a person who did not appear or assert any interest in the admiralty proceeding, owns a part of the vessel. (*Moynihan v. Drobaz*, 46.)

SITUS OF DEBT.

See *Attachment*, 2-4.

SLEEPING-CAR COMPANIES.

See *Railroads*, 5-7.

STATUTES.

1. STATUTES—CONSTRUCTION—INVENTORY OF WIFE'S SEPARATE ESTATE—FRAUDULENT CONVEYANCES.—Whatever may be the scope and purpose of a statute, authorizing a wife to file, and have recorded, an inventory of her separate estate, it is not entitled to such a construction as would nullify the provisions of another act concerning fraudulent transfers of personal property. (*O'Kane v. Whelan*, 42.)

2. STATUTES—CONSTRUCTION—EXECUTION OF MORTGAGES ON RAILWAY PROPERTY.—Although one part of a code of laws, conferring upon railroad corporations the power to mortgage their property, falls to prescribe the mode of executing such mortgages, yet if the mode and manner of executing mortgages of real and personal property is pointed out in another part of the code, without exception in favor of any person or corporation, the mode and manner thus pointed out must govern as to the execution of railway mortgages. (*Bishop v. McKillican*, 68.)

3. CONSTITUTIONAL LAW—VOID ORDINANCE.—If a statute provides that the punishment for a violation of a town ordinance shall consist of a fine, or, in default of the payment thereof, certain imprisonment, a town ordinance which allows imprisonment for a violation thereof, without first giving the person convicted an opportunity to pay a fine, is void. (*Calhoun v. Little*, 254.)

4. STATUTES—LIABILITY OF CORPORATIONS FOR INJURIES CAUSED TO EMPLOYÉ BY COEMPLOYE—CONSTITUTIONALITY.—A statute making railroad and other corporations, except municipal, answerable for injuries to their employés, resulting from the negligence of coemployés, does not deny to railroad companies the equal protection of the laws guaranteed by the state and federal constitutions, and is, therefore, constitutional. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

5. STATUTES FIXING LIABILITY OF CORPORATIONS—LITIGATING CONSTITUTIONALITY OF.—If an act fixing the liability of all corporations, except municipal, is valid as to a railroad corporation, a railroad company cannot litigate its constitutionality as to other corporations. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

6. STATUTES FIXING LIABILITY OF CORPORATIONS—EXEMPTION OF MUNICIPAL CORPORATIONS—CONSTITUTIONALITY.—A statute fixing the liability of railroad and other corporations is not unconstitutional because it exempts municipal corporations from its operation, for there is no necessary similarity between railroad corporations and municipal corporations, and many statutes apply to the former that do not apply to the latter. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

7. STATUTES—EXEMPTING CORPORATIONS FROM FUTURE LIABILITY—CONSTITUTIONALITY.—A statute which nullifies contracts made by railroad or other corporations, releasing them from future liability for personal injuries to employés, is not unconstitutional as violating the equality clause of either the state or federal constitution. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

8. STATUTES—WHAT IS GERMANE TO SUBJECT OF ACT AND NEED NOT BE EXPRESSED IN TITLE.—The prohibition of contracts releasing corporations from their liability, contained in an act which enlarges the liability of railroads, is germane to, and properly connected with, that main subject of the act, and need not be expressed in the title. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

9. STATUTES—SUFFICIENCY OF TITLE—DETAILS.—The title of an act need not go into details. It is sufficient if it indicates, with reasonable precision and clearness, the subject it embraces. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

10. STATUTES—DETAILS IN TITLE MUST BE GERMANE TO SUBJECT OF ACT.—An act is not invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

11. STATUTES—SUFFICIENCY OF TITLE AS TO EXPRESSION OF SUBJECT—ILLUSTRATION.—The subject of an act, entitled, "An act regulating railroads and other corporations," is sufficiently expressed in its title, although the act creates a liability which, up to the time of such enactment, had no existence. The act is, therefore, not unconstitutional on the ground that its subject is not expressed in its title. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

12. STATUTES—EX POST FACTO LAW—WHAT IS NOT—METHOD OF FIXING AMOUNT OF PUNISHMENT.—An indeterminate sentence law which does not add to, or increase, the punishment of an offense beyond that existing at the time of its commission is not *ex post facto*, though the crime was committed before the passage of the act. A different method of fixing the amount of punishment between certain limits, which merely mitigates the punishment, does not add to or increase it. (*Davis v. State*, 322.)

13. STATUTES—EX POST FACTO LAW—WHAT IS NOT—PRISON CREDITS.—An indeterminate sentence law is not *ex post facto* on the ground that it repeals a "good time" law, where the former simply substitutes a new and different method of crediting good time to the convict, and the latter is merely a rule for the government of prison officials, not applicable to one sentenced under the former law. (*Davis v. State*, 322.)

14. STATUTES—AMENDATORY ACT—SUBJECT IS EXPRESSED IN TITLE, WHEN.—An act amending a practice act and providing for special verdicts has its subject sufficiently expressed by a title which purports to amend a designated section of "an act concerning proceedings in civil cases." (*Udell v. Citizens' St. R. R. Co.*, 336.)

15. STATUTES—VALIDITY.—ACQUIESCENCE IN THE CONSTITUTIONALITY of a statute for over forty-five years by the courts of a state is a circumstance of some weight in determining the question of the validity of a similar statute. (*Udell v. Citizens' St. R. R. Co.*, 336.)

16. STATUTES—PROVISION FOR SPECIAL VERDICTS—CONSTITUTIONALITY—TRIAL BY JURY.—A statute amending a practice act, and providing for special verdicts, is not unconstitutional, as violating the right of trial by jury. (*Udell v. Citizens' St. R. R. Co.*, 336.)

17. CONSTITUTIONAL LAW.—STATUTES CANNOT VALIDATE BY ESTOPPEL an act that they are forbidden by the state constitution to authorize. (*Hutcheson v. Storrie*, 884.)

See Appeal, 6; Attachment, 15; Codes; Contracts, 9; Corporations, 11, 20; Estates, 2-4; Execution, 2; Highways, 2, 4; Insurance, 5, 10-12, 19-21; Mechanics' Liens; Municipal Corporations, 9-11, 15; Replevin, 9; Taxation, 5-8; Telegraph Companies, 2.

STATUTE OF FRAUDS.

See Landlord and Tenant, 4; Suretyship, 1.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTE OF USES.

See Trust, 15.

STIPULATION.

See Damages, 1.

SUBROGATION.

See Corporations, 3; Suretyship, 6, 7.

SUPPLEMENTARY PROCEEDINGS.

See Execution, 2-6.

SURETYSHIP.

1. SURETYSHIP — GUARDIAN'S BOND — STATUTE OF FRAUDS.—A surety on a guardian's bond is, within the contemplation of the statute of frauds, a creditor of the principal in such bond for all sums he is required to pay, because of the suretyship, from the date of the execution of the bond, though no default occurs until long afterward. The liability, whenever happening, relates back to the date of the contract. (*Ames v. Dorroh*, 522.)

2. SURETYSHIP — GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—DISCHARGE OF SURETY BY EXTENDING TIME OF PAYMENT—NOTICE—EFFECT OF.—If a grantee assumes the payment of a mortgage debt on the property conveyed, thus making the relation of the grantee and grantor or mortgagor toward the mortgagee that of principal and surety, any valid agreement between the mortgagee, where he has notice of the assumption of the debt, and the grantee, to extend the time of payment, without the consent of the surety or mortgagor, will discharge the latter, and a clause in the deed, reciting that the grantee assumes to pay the debt, is notice of the change of liability. (*Pratt v. Conway*, 602.)

3. SURETYSHIP — GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—DISCHARGE OF SURETY BY EXTENDING TIME OF PAYMENT—WANT OF NOTICE—EFFECT OF.—Although a grantee assumes the payment of a mortgage debt on the property conveyed, thus making the relation of the grantee and grantor or mortgagor toward the mortgagee that of principal and surety, an extension of the time of payment made by the mortgagee, does not discharge the mortgagor from his liability as surety, where there is no recital in the deed of such assumption of the debt, and the mortgagee has no knowledge or notice that the grantee agreed to assume it. (*Pratt v. Conway*, 602.)

4. SURETYSHIP — GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—DISCHARGE OF SURETY BY EXTENDING TIME OF PAYMENT—PLEADING.—If a grantee has assumed the payment of a mortgage debt on the property conveyed, thus making the grantee a principal, and the grantor or mortgagor a surety, with respect to the mortgagee, the mortgagor, to secure a discharge as surety, by reason of an extension of time of payment given by the holder of the debt, must plead the assumption of the debt by the grantee, and that the extension was made by the mortgagee with knowledge of the fact of such suretyship. (*Pratt v. Conway*, 602.)

5. SURETYSHIP — GRANTEE'S ASSUMPTION OF MORTGAGE DEBT—CREATION OF RELATION OF PRINCIPAL AND SURETY.—When a grantee accepts a deed with a clause reciting that he assumes to pay a debt secured by mortgage on the property so conveyed to him, he becomes directly liable to the holder and owner of the debt, and the relation of principal and surety thereafter exists between the grantee and the mortgagor, or principal debtor. (*Pratt v. Conway*, 602.)

6. SURETYSHIP — SUBROGATION OF SURETY—LIMITATION OF ACTION.—The right of a surety who has paid the debt of his principal to be subrogated to any securities held by the creditor as additional security for such debt, may become barred by lapse of time, and, under the Ohio statute, it is barred unless an action is brought within ten years from the time the cause of action accrued. (*Zuellig v. Hemerlie*, 707.)

7. SURETYSHIP—SUBROGATION OF SURETY TO SECURITY HELD BY PRINCIPAL.—If a surety on a note furnishes his

principal with money to pay off the debt, and the latter applies the money to that purpose, he must be regarded as the mere agent of the surety and the latter is entitled in equity to be subrogated to whatever securities the creditor has or had for the payment of such debt. (*Zuellig v. Hemerlie*, 707.)

8. SURETYSHIP—REMEDY OF SURETY.—A surety who has paid a note or other security for his principal cannot sue upon it directly in an action at law. His remedy is upon the implied contract of indemnity. (*Zuellig v. Hemerlie*, 707.)

9. SURETYSHIP—REMEDY OF SURETY.—A surety who has paid a debt for his principal may maintain an action on the implied promise of indemnity against the principal. (*Poe v. Dixon*, 713.)

10. SURETYSHIP — DISCHARGE — INDEPENDENT CONTRACT.—A surety is not discharged by an independent contract between the principal parties, although it may be contemporaneous with, and relate to, the same subject as the sureties' contract, without varying the terms thereof. To discharge the surety such variation must be in the terms of the contract by which the surety is bound. (*Stuts v. Strayer*, 723.)

11. SURETYSHIP—NOTES AS INDEMNITY—CONSIDERATION.—The maker of notes given to indemnify a surety on the bond of a defaulting officer, having been a mercantile partner of such officer, and the purpose in giving the notes being to save the partnership property from attachment in a suit by the surety against his principal, the questions whether an action had been commenced or a writ of attachment issued, and whether the defaulting officer had any real interest in the partnership property at the time when the notes were given, are immaterial as affecting the consideration for the notes, and are properly excluded from consideration by the jury. (*Bolln v. Metcalf*, 898.)

12. SURETYSHIP.—NOTES GIVEN BY A THIRD PERSON to one who is a surety upon the bond of a defaulting officer, to indemnify such surety must be held as indemnity for the benefit of a co-surety, equally with the payee named in the notes, and this although the latter intended such indemnity for his own exclusive benefit. (*Bolln v. Metcalf*, 898.)

13. SURETYSHIP—NOTES AS INDEMNITY—AMOUNT OF RECOVERY.—If notes are given by a third person to one who is a surety on the bond of a defaulting officer, as indemnity to such surety, he is entitled to recover, in his own name, the full amount of such notes, although he and his co-surety together may have paid the amount of such defalcation in the discharge of their obligation under the bond. (*Bolln v. Metcalf*, 898.)

See Arrest, 2; Sheriffs; Vendor and Purchaser, 1, 3.

TAXATION.

1. TAX SALES—NOTICE OF EXPIRATION OF REDEMPTION.—If a notice of the expiration of time of redemption from a tax sale states that the time in which to redeem will expire on two different dates, it is uncertain, ambiguous, and void. (*Clary v. O'Shea*, 465.)

2. TAXATION—TAX LIENS—LIMITATION OF ACTIONS.—An action for the enforcement of a tax lien is barred at the expiration of five years from the time that the cause of action accrued. (*Carson v. Broady*, 691.)

3. TAXATION—VOID TAX DEED—LIMITATION OF ACTIONS.—The statute of limitations begins to run against a void tax deed at the time when it is issued, and not at the time that such deed is judicially determined to be void. (*Carson v. Broady*, 691.)

4. TAXATION—TAX LIENS—LIMITATION OF ACTIONS.—When the cause of action on a tax lien becomes barred by limitation, the lien itself is extinguished and ceases to be a charge upon the land. (*Carson v. Broady*, 691.)

5. TAXATION OF INHERITANCES.—An act entitled "An act taxing gifts, legacies, and inheritances in certain cases, and providing for the collection thereof," and providing for the taxation of inheritances of personal property, is essentially and avowedly a tax law imposing a state tax on certain specified personal property, and has none of the features of an intestate law, or of an act regulating the disposition of property by will, or by instruments in the nature thereof. (*Estate of Cope*, 749.)

6. TAXATION OF INHERITANCES — CONSTITUTIONAL LAW.—A statute imposing a tax on gifts, legacies, and inheritances in certain cases, and providing for the collection thereof, but exempting from its operation personal property in all estates to the amount of five thousand dollars, is void, as in violation of a constitutional provision that all taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and that all laws exempting property from taxation, other than certain enumerated property, are void, when inheritances are not among such enumerated exemptions. (*Estate of Cope*, 749.)

7. TAXATION OF INHERITANCES—LOCAL LAWS—CONSTITUTIONAL LAW.—A statute imposing a tax on gifts, legacies, and inheritances in certain cases only is necessarily a special law and in conflict with a constitutional provision prohibiting the passage of any local or special law changing the law of descent or succession. (*Estate of Cope*, 749.)

8. TAXATION — UNEQUAL CLASSIFICATION—CONSTITUTIONAL LAW.—A pretended classification of property for the purposes of taxation that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, illegal and unconstitutional. (*Estate of Cope*, 749.)

See Liens, 1; Municipal Corporations, 6-8, 13, 14, 18.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—ERROR IN TRANSMISSION OF MESSAGE—NEGLIGENCE.—If a message as delivered to a telegraph company reads, "Attach property of A for seven hundred and ninety dollars," and the message as delivered reads, "Attach property of A for even hundred ninety dollars," the receiver of the message is not guilty of negligence in interpreting the amount as one hundred and ninety dollars, and the telegraph company is liable for all damages arising from its error in the message as delivered. (*Western Union Tel. Co. v. Beals*, 682.)

2. TELEGRAPH COMPANIES—LIABILITY FOR ERROR IN TRANSMITTING MESSAGE.—Under the Nebraska statute, a telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver messages received by it, notwithstanding a contrary agreement printed on its blanks. (*Western Union Tel. Co. v. Beals*, 682.)

3. TELEGRAPH COMPANIES—CONFLICT OF LAWS—NEG-LIGENCE.—The statute of a state restricting contracts limiting the time in which suit may be brought, or providing for notice before suit is brought on contracts for the sending and delivery of telegrams, applies to and governs a suit to recover for negligent delay in the delivery of a telegram after its arrival in that state, although it is sent from another state. (*Burgess v. Western Union Tel. Co.*, 833.)

See Interstate Commerce; Libel.

THREATS.

See Duress.

TITLE.

See Judicial Sales, 4; Jurisdiction; Partition; Trusts, 15.

TORTS.

See Building and Loan Associations, 6.

TOWNS.

See Highways, 8.

TRESPASS.

See Homicide, 18; Injunction, 2; Master and Servant, 3.

TRIAL.

1. TRIAL.—IF A SPECIAL VERDICT FAILS TO FIND MATERIAL FACTS, within the issue, which were established by the evidence, the remedy is not by a motion to coerce the jury into making such finding, but by a motion for a new trial by the party aggrieved. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

2. TRIAL—EXCUSING JURORS.—No error is committed where no injury results from the court's action in excusing a juror on its own motion. (*Pittsburgh etc. Ry. Co. v. Montgomery*, 301.)

3. TRIAL—REFUSAL OF INTERROGATORIES TO JURY.—If the interrogatories submitted to a jury cover every material question of fact in the case, there is no error in refusing certain other interrogatories prepared and tendered by plaintiff's counsel, especially where they call for mere opinions, conclusions of law, or evidentiary facts. (*Udell v. Citizens' St. R. R. Co.*, 336.)

4. TRIAL—GENERAL VERDICT—PRACTICE.—A party who considers himself entitled to a general verdict should ask for it at the right time and in the proper manner. (*Udell v. Citizens' St. R. R. Co.*, 336.)

5. TRIAL—SPECIAL VERDICT—VENIRE DE NOVO—PRACTICE.—A party who is dissatisfied with a special verdict should ask the court to set it aside, and award a venire de novo. (*Udell v. Citizens' St. R. R. Co.*, 336.)

6. TRIAL—QUALIFICATIONS OF JURORS—RESIDENCE.—If a juror is an old resident of the state, is a citizen of the county, has resided therein and voted at a late election, and has expressed an intention of voting therein again at the next general election, he is a resident of the county. (*State v. Burns*, 588.)

7. TRIAL—CRIMINAL CASES—POLLING JURY.—The trial court, in a criminal case, is not bound to poll the jury, of its own

motion, without a demand therefor by the defendant or his counsel. (*State v. Burns*, 588.)

8. **TRIAL.—A CONTINUANCE TO PROCURE WITNESSES IS PROPERLY REFUSED** where little or no diligence has been exhibited in getting them. (*State v. Burns*, 588.)

9. **TRIAL—OPENING STATEMENTS — ADMISSIONS PRECLUDING RECOVERY—PRACTICE.**—When counsel, in their opening statements, declare or admit facts the existence of which precludes a recovery by their clients, the court may close the case at once, and give judgment against the clients. (*Pratt v. Conway*, 602.)

See Action; Grand Jury.

TRUSTS.

1. **TRUSTEE'S SALES—SETTING ASIDE—EVIDENCE.**—A protested draft issued by a trustee to the holder of a note secured by trust deed, and tendered as interest on such note two months after sale of the trust property by the trustee, is admissible in evidence in an action to set aside such sale on the ground that it was unauthorized and void, as tending to show a purpose on the part of the trustee to conceal from the holder of the note the fact of an attempted foreclosure of the trust deed, and also as confirmatory of his statement that he had no knowledge of such attempt until put on inquiry by the protested draft. (*Bent Otero Improvement Co. v. Whitehead*, 140.)

2. **TRUSTEE'S SALES—REQUEST OF BENEFICIARY—CONDITION PRECEDENT.**—If the power of sale in a deed of trust is conditioned upon the request of the beneficiary, such request is a condition precedent to the power to sell in the absence of circumstances from which such request may be inferred. (*Bent Otero Improvement Co. v. Whitehead*, 140.)

3. **TRUSTEE'S SALES—CAVEAT EMPTOR.**—The rule of caveat emptor applies to trustee's sales, and a purchaser at such sale is bound to take notice that all the conditions upon which the trustee's power to act depends, have been complied with. (*Bent Otero Improvement Co. v. Whitehead*, 140.)

4. **TRUSTEE'S SALES—CAVEAT EMPTOR—RECITALS IN DEED—BURDEN OF PROOF.**—A provision in a deed of trust that in case of sale the recitals in the trustee's deed should be taken as prima facie evidence of the facts therein stated does not relieve the purchaser of the rule of caveat emptor, and, at most, only casts upon the party assailing the deed the burden of proof to overcome such presumption. (*Bent Otero Improvement Co. v. Whitehead*, 140.)

5. **TRUSTS—EXPENSES CHARGEABLE TO INCOME.**—However large, if properly and reasonably incident to the management of the estate in behalf of the party equitably entitled to the accruing income, and not resulting in a direct increase of the principal fund, nor in substitutions which vary the items of which that is composed, a trustee's charges and disbursements are, they are, under ordinary circumstances, payable from its income, if that be sufficient for the purpose, unless it be otherwise provided by the terms of the trust. (*Wordin's Appeal*, 219.)

6. **TRUSTS—EXPENSES.—AN ASSESSMENT** for asphaltting the street in front of land belonging to a trust estate, should be paid out of the income from the estate, in the absence of evidence showing that the improvement was of a permanent character. (*Wordin's Appeal*, 219.)

7. TRUSTS—EXPENSES CHARGEABLE TO INCOME.—Reasonable expenses in a foreclosure suit are ordinary expenses attending the administration of a trust estate, and are properly deducted from the fruits belonging to the party in immediate enjoyment of the equitable estate. (Wordin's Appeal, 219.)

8. TRUSTS — TRUSTEE'S SALES — NOTICE — INSUFFICIENCY.—A mere reference in a notice of sale under a trust deed to the page of the record for a description of the premises to be sold, without more, and without naming the grantor or grantee, and signed by a substituted trustee, is not a sufficient description of the land to be sold, and a sale thereunder is void. (Yellowly v. Beardsley, 536.)

9. TRUSTS—TRUSTEE'S SALES—NOTICE.—THE PURPOSE of notice of sale under a trust deed is not only to notify the mortgagor, but the public that the property may bring a fair price. (Yellowly v. Beardsley, 536.)

10. TRUSTS—TRUSTEE'S SALE—NOTICE—RIGHT OF SUBSEQUENT MORTGAGEE TO QUESTION.—Subsequent mortgagees, or those holding under them, can question the sufficiency of a notice under which a sale is made under a prior trust deed. (Yellowly v. Beardsley, 536.)

11. TRUSTS—TRUSTEE'S SALES — NOTICE.—ESSENTIALS of a notice of sale under a trust deed are a statement of the time, place, and terms of sale, and such a description of the property to be sold as, if read by persons familiar with the neighborhood, will advise them of what is to be sold and upon what terms it can be bought. (Yellowly v. Beardsley, 536.)

12. EQUITY—FOLLOWING TRUST FUNDS.—Equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. (Midland Nat. Bank v. Brightwell, 608.)

13. TRUSTS — CONSTRUCTIVE TRUSTEE — REIMBURSEMENT.—A constructive trustee may be allowed to recover reimbursement when the circumstances raising the trust are not directly the result of fraud. (Olson v. Lamb, 670.)

14. TRUSTS—CONSTRUCTIVE TRUSTEE—COMPENSATION. A constructive trustee, who is charged with rents, is entitled to recover his reasonable expenditures and reasonable compensation for managing the property. (Olson v. Lamb, 670.)

15. TRUSTS—DEVISE TO EXECUTORS FOR ANOTHER'S USE—LIFE TENANT—LEGAL TITLE—STATUTE OF USES.—When property is devised to executors for the use and benefit of the testator's son during the latter's life, the legal title remains in the executors, where duties are imposed upon them which render it absolutely necessary that the legal title should remain in them. It does not, therefore, pass to the tenant for life under the statute of uses because that statute does not apply to such a case. (People's Loan etc. Bank v. Garlington, 800.)

See Banks and Banking, 4, 6, 7; Fraudulent Conveyance, 1; Judicial Sales, 9.

ULTRA VIRES.

See Building and Loan Associations, 5, 6.

VARIANCE.

See Forgery, 4-6.

VENDOR AND PURCHASER.

1. **VENDOR AND VENDEE — ASSUMPTION OF MORTGAGE—PRINCIPAL AND SURETY.**—A grantee of land, who assumes as part of the purchase price to pay a debt secured thereon by mortgage, becomes the principal debtor with the grantor as his surety, although the latter is also personally bound to pay the debt. (*Poe v. Dixon*, 713.)

2. **VENDOR AND VENDEE — ASSUMPTION OF MORTGAGE—RIGHTS OF MORTGAGEE.**—If a grantee of land assumes, as part of the purchase price thereof, to pay a debt secured thereon by mortgage, the promise thus arising runs to the mortgagee and not to the grantor, and the former, though not a party to the deed, and not knowing of such arrangement when it was made, may maintain an action on such promise when it comes to his knowledge. (*Poe v. Dixon*, 713.)

3. **VENDOR AND VENDEE — ASSUMPTION OF MORTGAGE—GRANTOR AS SURETY FOR GRANTEE—STATUTE OF LIMITATIONS.**—If a grantee of land assumes, as part of the purchase price, to pay a debt secured thereon by mortgage, and the mortgage is foreclosed and the land sold to pay the debt, leaving unpaid a portion thereof which the grantor pays, he cannot maintain an action for indemnity on the recitals in the deed, but must resort to an action on the implied promise of indemnity by the vendee. Such cause of action accrues at the time that the grantor pays the debt, and is barred by limitation after the expiration of six years. (*Poe v. Dixon*, 713.)

4. **VENDOR AND VENDEE — NOTICE — UNDISCLOSED PARTNERSHIP IN LAND.**—A purchaser of notes and a lien given for the purchase price of land from a vendor who holds the apparent legal title is not affected by an agreement, of which he has no notice, between such vendor and his undisclosed partner in the ownership of the land. Such purchaser, however, acquires such lien subject to any right of such secret partner which appears in the chain of title, whether recorded or not. (*Spencer v. Jones*, 870.)

See Evidence, 11, 12; Pledge, 4.

WAREHOUSEMEN.

1. **WAREHOUSEMEN—FAILURE TO DELIVER—BURDEN OF PROOF.**—A failure on the part of a warehouseman to deliver goods on demand raises a presumption of liability for negligence, and the burden of proof is upon him to account for the nondelivery; but when he makes such an accounting the onus of proof shifts, and the presumption is raised that the loss thus accounted for is not the result of the warehouseman's negligence. (*Brunswick Grocery Co. v. Brunswick etc. R. R. Co.*, 249.)

2. **WAREHOUSEMEN—LIABILITY FOR LOSS CAUSED BY INDEPENDENT CONTRACTOR.**—A warehouseman is not liable for the loss of goods caused by fire resulting from the negligence of his employé, who, as an independent contractor, is exercising an independent business not subject to the immediate direction and control of such employer. (*Brunswick Grocery Co. v. Brunswick etc. R. R. Co.*, 249.)

WATER AND WATERCOURSES.

1. **WATERS AND WATERCOURSES — PRIORITIES IN WATER RIGHT.**—Evidence that after a transfer of priorities in water rights more lands were irrigated from the common source of

supply than before does not of itself necessarily establish an enlarged diversion or user of which the junior appropriator can complain. (Cache La Poudre Irr. Co. v. Larimer etc. Co., 123.)

2. WATERS AND WATERCOURSES—PRIORITIES IN WATER RIGHTS.—The apportionment of water which the owners of a prior right make between themselves cannot be complained of by a junior appropriator, so long as no more water than the priority calls for is diverted from the common source, and so long as the consumers have a necessity for it, and apply it to a beneficial purpose. (Cache La Poudre Irr. Co. v. Larimer etc. Co., 123.)

3. WATERS AND WATERCOURSES—TRANSFER OF STOCK AS TRANSFER OF WATER RIGHTS.—A transfer of stock in an irrigating ditch operates as a transfer of the right to the use of the water, as well as an interest in the corporation issuing such stock, when such corporation is formed of the cotenants owning the ditch and water rights, and such shares of stock represent not only the rights of the parties in the ditch, but also the right to the use of the water. (Cache La Poudre Irr. Co. v. Larimer etc. Co., 123.)

4. WATERS AND WATERCOURSES—SALE OF WATER RIGHTS SEPARATE FROM LAND.—There may be a sale of a water right separate from the land, and an application of the water to other land, so long as the rights of third persons are not infringed. (Cache La Poudre Irr. Co. v. Larimer etc. Co., 123.)

5. WATERS AND WATERCOURSES.—APPROPRIATION of water can only be made by an actual diversion, followed by an application thereof within a reasonable time, to a beneficial use. (Cache La Poudre Co. v. Water etc. Co., 131.)

6. WATERS AND WATERCOURSES—APPROPRIATION—TIME OF USE.—One person may make a prior appropriation of a certain quantity of water to be enjoyed for a designated period of time or part of the year, and another person an appropriation of a like quantity from the same source during another period or part of the year, and, as to the latter, be a prior appropriator himself. (Cache La Poudre Co. v. Water etc. Co., 131.)

7. WATERS AND WATERCOURSES—APPROPRIATION—CHANGE OF USE.—If water is appropriated for mill power purposes, and, after its use, permitted to flow undiminished back into the natural stream, it is then subject to another appropriation, and, when appropriated, the mill owner or his grantee cannot change the character of its use or place of diversion, to the injury of the appropriator below the mill. (Cache La Poudre Co. v. Water etc. Co., 131.)

8. WATERS AND WATERCOURSES—APPROPRIATION—CHANGE OF USE—PRIORITIES.—If water has been appropriated for mill power purposes, and, after such use, returned to the stream in undiminished quantity, and then appropriated by a lower proprietor for irrigation purposes, the latter acquires a prior right to the use of the water, which cannot be defeated by an abandonment of the mill appropriation in favor of, or by transfer to, an appropriator above the mill, whose appropriation for irrigation purposes is prior to the appropriator below the mill, but subsequent to the appropriation by the mill owner. (Cache La Poudre Co. v. Water etc. Co., 131.)

9. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—RIGHT OF PASSAGE OR TO FLOAT LOGS IN NAVIGABLE STREAM.—The right of passage on a navigable stream is a common and paramount right, but must be exercised with due regard to the rights of riparian owners, and with ordinary care and skill.

Floating logs in such a stream may cause damage to the estate of the riparian owner, but, if the party floating the logs, uses due care and skill, he is not liable in damages. (*Coyne v. Mississippi etc. Boom Co.*, 508.)

10. **WATERS AND WATERCOURSES—RIPARIAN RIGHTS—RIGHT TO FLOAT LOGS.**—A private individual, upon whom the privilege has been conferred by statute, has the right to use a navigable stream as a highway for the floating or driving of logs, and the rights of riparian owners are subordinate to this use, if reasonably exercised. (*Coyne v. Mississippi etc. Boom Co.*, 508.)

11. **WATERS AND WATERCOURSES—APPROPRIATION—NEGLECT TO FILE STATEMENT.**—As against one who is in no better condition, the neglect to file a statement of the appropriation of water as required by statute is not fatal to an appropriation made in good faith. (*Moyer v. Preston*, 914.)

12. **WATERS AND WATERCOURSES—APPROPRIATION.**—The right to the use of water for beneficial purposes depends upon a prior appropriation. (*Moyer v. Preston*, 914.)

13. **WATERS AND WATERCOURSES—APPROPRIATION OF WATERS OF SPRING.**—The waters of a spring, naturally flowing into and tributary to a river, must be considered as part of it for the purposes of appropriation of water. (*Moyer v. Preston*, 914.)

14. **WATERS AND WATERCOURSES — APPROPRIATION, WHAT CONSTITUTES.**—To constitute an appropriation there must exist not only an intent to take the water, but that intent must be accompanied or followed by some open, physical demonstration, and there must ultimately be an application to some beneficial use. The initial act must also be followed with reasonable diligence, and the purpose consummated without unnecessary delay in order that, by the doctrine of relation, the time of appropriation may relate to such initial proceeding. (*Moyer v. Preston*, 914.)

15. **WATERS AND WATERCOURSES—APPROPRIATION—LACK OF DILIGENCE.**—If a person does two days' work during one year, in cleaning out a spring, to facilitate the flow of the waters thereof to a river, of which it is a tributary, and the next year does only one day's work in again cleaning out the spring, and in the year commences to build a dam and ditch necessary in the appropriation of the water, he shows a lack of diligence, and his appropriation, as to time, must depend upon the work done during the latter years, as the work done in the preceding years cannot be connected therewith. (*Moyer v. Preston*, 914.)

See Conveyances; Nuisance, 2-5.

WILLS.

1. **WILLS AS EVIDENCE.**—To entitle a person to offer in evidence a will under which he claims title, he must first show that it has been regularly admitted to probate, in any proceeding other than one to establish the will. (*Pratt v. Hargreaves*, 551.)

2. **WILLS—RECOGNITION OF BEFORE PROBATE.**—A court of equity cannot recognize, nor act upon, a will until it has been admitted to probate. (*Pratt v. Hargreaves*, 551.)

WITNESSES.

1. **WITNESSES — CORROBORATION.**—A witness cannot be corroborated by proof of his previous statements to the same effect. (*Baxter v. Camp*, 169.)

2. WITNESSES—IMPEACHMENT—STATEMENT.—Upon the trial of a defendant for murdering his wife, where his mother has testified that he would not kill his wife because he loved her so, and denied that she told another witness, immediately after the killing, and in the presence of the dying woman, that the defendant had said that "if he ever saw Mag again he would kill her, and die or go to the pen, and now he has made his word good," it is proper to ask such other witness, for the purpose of impeachment, whether the defendant's mother had made such statement, because, if she did, she knew that the defendant had threatened to kill his wife. (State v. Burns. 588.)

See Contract, 12; Evidence, 1, 2; Trial, 3.

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